TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1918

No. [redacted] 177

STANDARD OIL COMPANY, PLAINTIFF IN ERROR,

vs.

H. T. GRAVES AND H. T. GRAVES AS COMMISSIONER OF AGRICULTURE OF THE STATE OF WASHINGTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

FILED APRIL 24, 1917.

(25,920)

(25,920)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 1090.

STANDARD OIL COMPANY, PLAINTIFF IN ERROR,

vs.

H. T. GRAVES AND H. T. GRAVES AS COMMISSIONER OF AGRICULTURE OF THE STATE OF WASHINGTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 16, 1917.

1 In the Superior Court of the State of Washington for Thurston County.

13657.

No. 6078.

STANDARD OIL COMPANY, a Corporation, Plaintiff,

vs.

H. T. GRAVES and H. T. GRAVES as Commissioner of Agriculture of the State of Washington, Defendants.

Index.

Filed in Supreme Court of Washington, Aug. 31, 1916. C. S. Reinhart, Clerk.
Filed in Superior Court Thurston Co., W'n, May 23, 1916. A. C. Baker, Dep. Clerk.

2 In the Superior Court of the State of Washington for Thurston County.

No. 6078.

STANDARD OIL COMPANY, a Corporation, Plaintiff,

vs.

H. T. GRAVES and H. T. GRAVES as Commissioner of Agriculture of the State of Washington, Defendants.

Amended Complaint.

Comes now the plaintiff in the above entitled cause and with leave of court being first had and obtained, makes and files an Amended Complaint herein, and for cause of action alleges:

I.

That plaintiff is now and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of California; that it is duly registered and author-

ized to do business in the State of Washington, and has paid to said state all corporate and annual license fees and its annual license fee last due.

II.

That defendant, H. T. Graves, is the duly appointed, qualified and acting commissioner of Agriculture of the State of Washington, and under and pursuant to the laws of 1913, chapter 60 of the State of Washington, said defendant has the power and it is his duty, to exercise all the powers and perform all the duties theretofore vested in and required to be performed by the State Oil Inspector under the laws of the state of Washington of 1907, chapter 192, hereinafter referred to; that a portion of the acts done, as hereinafter complained of, were done and are threatened to be done in King county aforesaid.

III.

3 Plaintiff is engaged in the state of California in the business of producing and buying crude petroleum oil, and of manufacturing and refining the same, and of shipping products of such manufacture, to-wit, illuminating oils, gasoline, distillate and other volatile products of petroleum from its refineries in California into the state of Washington, where the same are sold by this plaintiff in large quantities for use and consumption in the state of Washington for illuminating, manufacturing, domestic and power purposes. None of the products hereinabove referred to are manufactured by plaintiff in the state of Washington, but all of said products are shipped into said state from the state of California.

IV.

Plaintiff maintains in the state of Washington wharves and docks, tanks, warehouses, buildings, machinery, horses and wagons and other equipment for receiving, shipping, handling, selling and otherwise distributing said products shipped as aforesaid from the state of California into the state of Washington.

V.

Under and pursuant to the provisions of chapter 192 of the laws of 1907 of the legislature of the state of Washington, plaintiff has paid the following fees required by the defendant, and his predecessors in office, in accordance with the provisions of said act, to-wit:

In the year 1908	$18,527.61
In the year 1909	$24,482.77
In the year 1910	$27,157.84
4 In the year 1911	$27,728.08
In the year 1912	$37,271.70
In the year 1913	$42,321.39
In the year 1914	$58,004.13
1915 to August 31	$32,987.28

All of said sums were paid by plaintiff under the schedule of fees provided in Section 4 of said Act hereinbefore referred to on illuminating oil, gasoline, distillate and other volatile petroleum products manufactured by this plaintiff in the State of California as aforesaid, and shipped by it from the state of California into the state of Washington, and there sold for use and consumption in said state of Washington.

VI.

The total receipts from the fees collected under said statute, chapter 192 of the laws of 1907, and chapter 161, laws of 1905, of the state of Washington, for the inspection therein provided for of said products mentioned in said laws intended for sale or consumption in this state, and the total disbursements in connection with the collection thereof, and in connection with the administration of said laws, and the net revenue from such receipts during the following years have respectively been the following:

Date.	Receipts.	Disbursements.	Revenue.
June 30 to Dec. 31, 1905.	$5,693.19	$4,947.70	$745.49
Jan. 1 to Dec. 31, 1906...	$9,539.86	$6,610.80	$2,929.06
Jan. 1 to Dec. 31, 1907..	$19,084.29	$7,551.70	$11,532.59
Jan. 1 to Dec. 31, 1908..	$23,493.93	$8,684.87	$14,809.06
Jan. 1 to Dec. 31, 1909..	$24,799.67	$8,802.90	$15,996.77
Jan. 1 to Dec. 31, 1910..	$35,174.64	$8,469.00	$26,705.64
Jan. 1 to Dec. 31, 1911..	$38,344.42	$8,762.85	$29,581.57
Jan. 1 to Dec. 31, 1912..	$48,489.73	$8,860.80	$39,628.93
5			
Jan. 1 to Dec. 31, 1913..	$51,816.91	$8,859.00	$42,957.91
Jan. 1 to Dec. 31, 1914..	$79,339.66	$8,553.75	$70,785.91
	$335,776.30	$80,103.37	$255,672.93

In the foregoing statement the column "Revenue" shows the amount realized from the fees charged pursuant to said Act, (Chapter 192 of the laws of 1907, and Chapter 161 of the Laws of 1905) over and above the amounts paid for salaries and other expenses in administering the provisions of the Act, Chapter 192 of the Laws of 1907, and the provisions of said chapter 60, Laws of 1913, applicable to inspection of oils, gasoline, benzine, distillate and volatile products of petroleum, and Chapter 161 of the Laws of 1905.

VIII.

Ever since the enactment of Chapter 192 of the Laws of 1907, the fees provided thereby have been and are disproportionate to the service rendered in the inspection and branding of the products referred to in said Act, and have included and include a far greater amount than is properly paid or payable for the legitimate inspection

and branding of the products referred to in said Act, and have greatly exceeded and exceed, as appears from the statements of the preceding paragraph VI hereof, the cost of administering the provisions of said Act of 1907 and said Act of 1913, and have been and are excessive, oppressive and not justified by the requirements and cost of a reasonable inspection and branding of the products hereinbefore referred to, or the cost of administering the provisions of said Act of 1907 and said Act of 1913, and materially and unreasonably exceed such cost. The excess of the amount of said fees over and above the cost of inspecting and branding said products and of administering the provisions of said Acts of 1907 and 1913 have steadily and materially increased during each year since said Acts have been in force. Plaintiff is informed and believes and therefore, alleges, that such excess of the amount of said fees over said cost of inspecting and branding said products and administering the provisions of said Acts will continue to increase.

6 VIII.

Said fees, by reason of the great excess in the amount thereof over the cost of inspecting and branding said products and of administering the provisions of the acts of 1907 and 1913 are in violation of the Constitution of the United States, and constitute an impost and duty on imports into the state of Washingon, and constitute a burden on interstate commerce, and an unwarranted and illegal revenue for said state, and deprive the plaintiff of its property without due process of law, and deny the plaintiff the equal protection of the laws, all in violation of Article 1, Section 8, Clause 3, Article 1, Section 10, Clause 2 and Article 1, Section 9, Clause 5, of the Constitution of the United States, and of Article XIV, Section 1 of the Amendments to the Constitution of the United States, and of Article 1, Section 3, and of Article VII, Sections 2 and 5 of the Constitution of the State of Washington.

IX.

The defendant threatens to, and unless restrained by this Honorable Court will, continue to enforce each and all of the provisions of said Act of 1907, and will refuse to inspect or brand the illuminating oil, gasoline, distillate, and other volatile products of petroleum manufactured by this plaintiff in the state of California, and shipped by it from said state into the state of Washington for sale for use and consumption there, as aforesaid, unless this plaintiff pays the fees prescribed by said Act, and unless said fees are so paid said defendant will, unless so restrained, institute criminal prosecutions against this plaintiff, and will thus subject plaintiff to unjust and oppressive litigation, and to a multiplicity of law suits, and to the expenses incident thereto, and will prevent plaintiff from selling in the state of Washington its said products manufactured in the state of California and shipped into the state of Washington, as aforesaid.

Wherefore, plaintiff prays that pending the further hearing of this cause, this court do make and issue its injunction and restraining

order enjoining and restraining the defendant from collecting the fees prescribed by said Act of 1907, or any of them, from this
7 plaintiff and from enforcing any of the provisions of said Act of 1907 with respect to this plaintiff, or any of its business in the state of Washington and that upon the final hearing of this cause, such injunction and restraining order may be made perpetual, and said act of 1907 declared void and unconstitutional, and for such other and further relief as may to the court seem meet and proper in the premises.

BALLINGER, BATTLE, HULBERT & SHORTS,
PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiff.

8 STATE OF WASHINGTON,
County of King, ss:

R. A. Ballinger, being first duly sworn on oath deposes and says: That he is a member of the firm of Ballinger, Battle, Hulbert & Shorts, one of the attorneys for plaintiff in the above entitled action; that he makes this affidavit for and on behalf of said plaintiff corporation for the reason that said plaintiff is a foreign corporation, and that all the material allegations of said Amended Complaint are within the personal knowledge of affiant; that affiant has read the foregoing Amended Complaint, knows the contents thereof and believes the same to be true.

R. A. BALLINGER.

Subscribed and sworn to before me this 8th day of February, 1916.

[SEAL.] R. G. DENNEY,
Notary Public in and for the State of Washington, Residing at Seattle.

Filed March 24, 1916.

9 In the Superior Court of the State of Washington for Thurston County.

No. 6078.

STANDARD OIL COMPANY, a Corporation, Plaintiff,

vs.

H. T. GRAVES and H. T. GRAVES as Commissioner of Agriculture of the State of Washington, Defendants.

Demurrer to Amended Complaint.

Comes now the defendant above named, personally and as acting commissioner of agriculture of the state of Washington, and demurs to the amended complaint of the plaintiff upon the grounds:

I.

That the court has no jurisdiction of the person of the defendant or of the subject matter of the action.

II.

That the complaint does not state facts sufficient to constitute a cause of action.

W. V. TANNER,
Attorney General;
EDWARD W. ALLEN,
Assistance Attorney General,
Attorneys for Defendant.

Filed Mar. 24, 1916.

10 In the Superior Court of the State of Washington for Thurston County.

No. 6078.

STANDARD OIL COMPANY, a Corporation, Plaintiff,

vs.

H. T. GRAVES and H. T. GRAVES as Commissioner of Agriculture of the State of Washington, Defendants.

Judgment.

Heretofore there came on duly and regularly for hearing the demurrer of defendants to plaintiff's amended complaint, the plaintiff appearing by Ballinger, Battle, Hulbert and Shorts, and Pillsbury, Madison and Sutro, the defendants appearing by W. V. Tanner, Attorney General, and Edward W. Allen, Assistant Attorney General, and after argument had and duly considering said complaint and said demurrer, it is by the court hereby

Considered, ordered, adjudged, and decreed, that said demurrer of defendants to plaintiff's amended complaint be and the same is hereby overruled and denied.

Whereupon and in open court defendants through their said attorneys elected to stand upon their said demurrer and failed and refused to plead further.

Whereupon in open court and upon motion of the attorneys for plaintiff, defendants and their agents, deputies, and inspectors are hereby restrained and enjoined from collecting the fees prescribed by Chapter 192 of the Laws of 1907 and Chapter 161 of the Laws of 1905 of the State of Washington from plaintiff, and from enforcing any of the provisions of either of said acts or any amendments
11 of either of said acts with respect to plaintiff or any of its business in the state of Washington, and said acts of 1905

and 1907 and any amendments thereof are hereby declared void and unconstitutional so far as regards any provision thereof relative to the collection of inspection or other fees therein mentioned from plaintiff; and

It is further ordered, adjudged and decreed That all sums of money paid by plaintiff into the registry of the superior court of King county and thereafterwards transferred to the registry of this court, and all sums of money thereafterwards paid by plaintiff into the registry of this court pursuant to orders heretofore made in this cause, and now held in the registry of this court, be and the clerk is hereby authorized, empowered and directed to repay to plaintiff such sums of money and the whole thereof.

It is further ordered, adjudged and decreed, That plaintiff have and recover of and from defendants its costs and disbursements herein incurred.

Dated this 15th day of May, 1916.

Enter,

D. F. WRIGHT, *Judge.*

O. K.
W. V. TANNER,

Filed May 17, 1916.

12 In the Superior Court of the State of Washington for Thurston County.

No. 6078.

STANDARD OIL COMPANY, a Corporation, Plaintiff,

vs.

H. T. GRAVES and H. T. GRAVES as Commissioner of Agriculture of the State of Washington, Defendants.

Notice of Appeal.

To Standard Oil Company, a corporation, plaintiff herein, and to Messrs. Ballinger, Battle, Hulbert & Shorts, and Pillsbury, Madison & Sutro, its attorneys:

You and each of you are hereby notified that the defendants herein, feeling themselves aggrieved at the judgment of this court granting the relief prayed for in the complaint herein, which said judgment was signed on the 15th day of May, 1916, and filed in this court upon the 17th day of May, 1916, appeals from said judgment, and each and every part thereof, to the supreme court of the state of Washington.

Dated this 18th day of May, 1916.

W. V. TANNER,
Attorney General;
L. L. THOMPSON,
Assistant Attorney General,
Attorneys for Defendants.

Service of copy of above Notice is hereby acknowledged, May 19, 1916.

BALLINGER, BATTLE, HULBERT & SHORTS, *Attorneys for Plaintiff.*

Filed May 20, 1916.

13 In the Superior Court of the State of Washington for Thurston County.

No. 6078.

STANDARD OIL COMPANY, a Corporation, Plaintiff,

vs.

H. T. GRAVES and H. T. GRAVES as Commissioner of Agriculture of the State of Washington, Defendants.

Clerk's Certificate.

STATE OF WASHINGTON,
County of Thurston, ss:

I, A. C. Baker, Deputy County Clerk and Deputy Clerk of the Superior Court of the State of Washington, for Thurston County, do hereby certify that the foregoing is a full, true and correct transcript of so much of the record in the above entitled cause as I am by the appellant required to transmit to the supreme court.

In testimony whereof, I have hereunto set my hand and the seal of said superior court this 23rd day of May, 1916.

[SEAL.] A. C. BAKER,
Deputy County Clerk and Deputy Clerk of the Superior Court, Thurston County, Washington.

Revenue Stamp.

14 *Opinion of Supreme Court.*

[No. 13657. En Banc. January 13, 1917.]

STANDARD OIL COMPANY, Respondent,

v.

H. T. GRAVES, as State Commissioner of Agriculture, Appellant.

14½ The purpose of this action was to enjoin the enforcement of the oil inspection act passed by the legislature of this state. To the amended complaint, a demurrer was interposed and overruled by the trial court. The defendant refused to plead further and

elected to stand upon his demurrer. Thereupon a judgment was entered granting a permanent injunction restraining the defendant from enforcing the law. From this judgment, the defendant appeals. The facts stated in the amended complaint, sufficient to an understanding of the questions here presented, may be summarized as follows:

The respondent is a corporation, organized and existing under the laws of the state of California. The appellant is the commissioner of agriculture of the state of Washington, and, under chapter 60, the Laws of 1913, it is made his duty to enforce the state oil inspection law. The respondent is engaged in the state of California in the business of producing and buying crude petroleum oil, and of manufacturing and refining the same, and of shipping products of such manufacture from its refineries in the state of California into the state of Washington, where the same "are sold by this plaintiff in large quantities for use and consumption in the state of Washington for illuminating, manufacturing, domestic and power purposes." The respondent maintains in the state of Washington wharves, docks, tanks, warehouses, and other equipment necessary for the selling and distributing of oils which are shipped into this state for use and consumption. Under the provisions of chapter 192 of the Laws of 1907, the respondent has, for a number of years, paid the inspection fees provided for in that act, and the amount so paid is largely in excess of the reasonably necessary cost of inspecting and labeling the oils and administering the law. From June 30, 1905, to December 31, 1914, the amount of the fees collected which were in excess of the cost of inspecting and labeling the oil and the administering of the law was $255,672.93. Since the act of 1907 was passed, the excess fees over what was reasonably necessary for the inspection, labeling,
14 and administering the law has gradually increased. During the year 1914, the gross receipts from the enforcement of this law were $79,339.66. The disbursements under the law were $8,553.75, leaving a net revenue for that year of $70,785.91, which was paid into the treasury as required by the statute. It is alleged that the appellant, unless restrained, will continue to enforce the provisions of the law, and will refuse to inspect the illuminating oil, gasoline, distillate, and other volatile products of petroleum manufactured by the respondent in the state of California and shipped by it from that state into the state of Washington for sale, for use, and consumption therein, unless the respondent pays the fees required by the act. It is claimed that the law offends against certain provisions of the Constitution of the United States, as well as the constitution of this state. These constitutional provisions will be hereinafter referred to and considered.

The inspection law referred to in the complaint was first passed during the legislative session for the year 1905. That act was amended in 1907, and will be found in chapter 192 of the Laws of 1907. Section 3 (Id., § 6052) of this act provides that all gasoline, benzine, distillate or other volatile products of petroleum intended for use or consumption in this state for illuminating, manufacturing, domestic or power purposes, "before being sold or offered for sale," shall be in-

spected by the state oil inspector or his deputies. When the inspection is made, a certificate is to be issued, and the barrel or receptacle which contains the oil must be labeled or branded. Section 4 of the act contains a schedule of the fees which shall be paid for the inspection. Section 6 provides that if any person or persons, whether manufacturer, vender or dealer, or as agent or representative of any manufacturer, vender or dealer, "shall sell or attempt to sell" to any person, firm or corporation in this state, any illuminating oil, gasoline, benzine, distillate or other volatile product of petroleum, intended for use or consumption within this state, that has not been inspected and branded according to the provisions of the act, "shall be guilty of a gross misdemeanor." By the Laws of 1913, chapter 60, it was made the duty of the commissioner of agriculture to exercise all the powers and perform all the duties which, by the law of 1907, were vested in, and required to be performed by, the state oil inspector.

The first question is whether the oil inspection law offends against article 1, section 10, clause 2, of the Federal constitution,
14 which provides that no state shall, without the consent of Congress, "lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; * * *" This constitutional provision, as construed by the Federal supreme court, does not refer to articles carried from one state into another, but only to articles imported from foreign countries into the United States. Woodruff v. Parham, 8 Wall. 123; Brown v. Houston, 114 U. S. 622; Patapsco Guano Co. v. North Carolina Board of Agriculture 171 U. S. 345.

Under the facts stated in the amended complaint, the oil was not imported from a foreign country into the United States, but was carried from one state into another, and the constitutional provision referred to has no application.

The second question is whether article 1, section 9, clause 5, of the Federal constitution, which provides that "no tax or duty shall be laid on articles exported from any state," can be invoked by the respondent. This mandate relates only to exportations to foreign countries, and is designed to give immunity from taxation to property that is in the actual course of such exportation. Dooley v. United States, 183 U. S. 151; United States v. Hvoslef, 237 U. S. 1.

The third question is whether the statute required the inspection to be made during the time that the oil was an article in interstate commerce. Article 1, section 8, clause 3, of the Federal constitution provides that the Congress of the United States shall have power "to regulate commerce with foreign nations and among the several states and with the Indian tribes." The determination of this question involves a consideration of the question whether the oil owned by the respondent in this state, when it was sought to be subjected to the inspection tax, was then an article in interstate commerce. In the solution of this question, the decisions of the United States Supreme Court are controlling. In Bacon v. Illinois, 227 U. S. 504, grain had been shipped by the original owners, who were residents of the southern and western states, under contracts for its transportation to New

York, Philadelphia, and other eastern cities. These contracts reserved to the owners the right to remove the grain from the cars at Chicago "for the mere temporary purposes of inspecting, weighing, cleaning, clipping, drying, sacking, grading or mixing, or changing the ownership, consignee or destination" thereof. While the grain was in transit, it was purchased by Bacon, the plaintiff, in error, who succeeded to the rights of the vendors, under the contracts of shipment. At the points of destination, Bacon was represented by agents, through whom he disposed of the grain and other commod-
14 ities on the eastern markets. The grain there in question was purchased by him solely for the purpose of being sold in this way, and with the intention to forward it according to the shipping contracts. It was not his intention to dispose of it in Illinois. Upon the arrival of the grain in Chicago, Bacon availed himself of the privilege reserved, and removed it from the cars to his private elevator. This removal was for the sole purpose of inspecting, weighing, grading, mixing, etc., and not for the purpose of changing its ownership, consignee or destination. All grain remained in the elevator only for such time as was reasonably necessary for the purposes mentioned, and immediately after these purposes had been accomplished, it was turned over to the railroad companies, and forwarded by them to the eastern cities, in accordance with the original contract. No part of the grain was sold or consumed in Illinois. While it was in Bacon's elevator in Chicago, it was, by the board of assessors of Cook county, Illinois, assessed, and a tax levied thereon. Upon these facts, it was held that the grain, when the tax was assessed, was not the subject of interstate commerce, because the property was in the state of Illinois for purposes deemed by the owner to be beneficial — himself, and was not in actual transportation. It was there said:

"But neither the fact that the grain had come from outside the state nor the intention of the owner to send it to another state and there to dispose of it can be deemed controlling when the taxing power of the state of Illinois is concerned. The property was held by the plaintiff in error in Chicago for his own purposes and with full power of disposition. It was not being actually transported and it was not held by carriers for transportation. The plaintiff in error had withdrawn it from the carriers. The purpose of the withdrawal did not alter the fact that it had ceased to be transported and had been placed in his hands. He had the privilege of continuing the transportation under the shipping contracts, but of this he might avail himself or not as he chose. He might sell the grain in Illinois or forward it as he saw fit. It was in his possession with the control of absolute ownership. He intended to forward the grain after it had been inspected, graded, etc., but this intention, while the grain remained in his keeping and before it had been actually committed to the carriers for transportation, did not make it immune from local taxation. He had established a local facility in Chicago for his own benefit and while, through its employment, the grain was there at rest, there was no reason why it should be included with his other property within the state in an assessment for taxation which

was made in the usual way without discrimination. Wood-
14[5] ruff v. Parham, supra; Brown v. Houston, supra; Coe v. Errol, supra; Pittsburgh & Southern Coal Co. v. Bates, 156 U. S. 577; Diamond Match Co. v. Ontonagon, supra; American Steel & Wire Co. v. Speed, supra; General Oil Co. v. Crain, supra.

"The question, it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with this paramount authority. American Steel & Wire Co. v. Speed, supra, pp. 521, 522. Thus, goods within the state may be made the subject of a nondiscriminatory tax though brought from another state and held by the consignee for sale in the original packages. Woodruff v. Parham, supra. In Brown v. Houston, supra, the coal on which the local tax was sustained had not been unloaded, but was lying in the boats in which it had been brought into the state and from which it was offered for sale. In Pittsburgh & Southern Coal Co. v. Bates, supra, coal had been shipped from Pittsburgh to Baton Rouge in barges which to accommodate the owner's business, had been moored about nine miles above the point of destination. The coal while remaining on the barges under these conditions was held subject to taxation. In General Oil Co. v. Crain, supra, the oil which had been brought from Pennsylvania to Memphis, a distributing point, was held in tanks, one of which was kept for oil for which orders had been received from Arkansas, Louisiana and Mississippi prior to the shipment from Pennsylvania, and which had been shipped especially to fill such orders. The tank was marked 'Oil Already Sold in Arkansas, Louisiana and Mississippi.' The local tax upon this oil, which remained in Tennessee only long enough (a few days) to be properly distributed according to the orders, was sustained.

"In the present case the property was held within the state for purposes deemed by the owner to be beneficial; it was not in actual transportation; and there was nothing inconsistent with the Federal authority in compelling the plaintiff in error to bear with respect to it, in common with other property in the state, his share of the expenses of the local government."

We have quoted thus copiously from that opinion, because it seems to fully and clearly set forth the views of the court, and reviews the previous holdings. In General Oil Co. v. Crain, 209 U. S. 211, it was sought to subject certain oils in the tanks or containers to the payment of the oil inspection tax of that state. It was there con-
14[6] tended that the oil in the tanks mentioned was in transit from the place of manufacture, in Pennsylvania, to the place of sale, in Arkansas, and other southwestern states, and that the delay at Memphis was merely for the purpose of separation, distribution and reshipment, and was for no longer time than required by the nature of the business and the exigencies of transportation. The oil at Memphis, Tennessee, was placed in two tanks, when it was removed from the tank cars in which it had been shipped from Pennsylvania. In one tank was kept the oil for which orders had been received from the states above mentioned before its shipment from the manufactur-

ing plants, and which had been shipped to fill such orders. This oil was unloaded at Memphis only for the purpose of distribution into smaller vessels to meet the requirement of such orders, and it was kept separate from oils for sale in Tennessee. It remained in Tennessee only long enough (a few days) to be properly distributed according to the orders therefor. In another tank, or vessel, was the oil to be sold in the states mentioned, but for which no orders, at the time of shipment from the manufacturing plants, had been received. The oil in this tank was marked "Oil to be sold in Arkansas, Louisiana and Mississippi," and was kept separate and apart from all other oil until required to supply orders to plaintiff's customers in those states. The legislature of the state of Tennessee had previously passed an oil inspection law which is strikingly similar to the law of this state. The question there was whether the oils in the two tanks mentioned were subject to the inspection tax provided by the Tennessee law. It was there claimed that the fees were unreasonable and exorbitant for the services performed, and very much greater than necessary to provide for inspection, and that, after payment of the salaries and other expenses incident to inspection, a surplus of many thousand dollars went annually into the treasury. It was there held that the oil in both tanks had lost its character as an article in interstate commerce, and was subject to the power of the state to tax, because the oil had been brought to a state of rest in the state of Tennessee, and was entitled to the protection of the laws of that state, and was placed in the tanks for the business purposes of the owner. It was there said:

"The company was doing business in the state, and its property was receiving the protection of the state. Its oil was not in movement through the state. It had reached the destination of its first shipment, and it was held there, not in necessary delay or accommodation to the means of transportation, as in State etc. v. Engle, supra,
147 but for the business purposes and profit of the company. It was only there for distribution, it is said, to fulfill orders already received. But to do this required that the property be given a locality in the state beyond a mere halting in its transportation. It required storage there—the maintenance of the means of storage, of putting it in and taking it from storage. The bill takes pains to allege this. 'Complainant shows that it is impossible, in the coal oil business, such as complainant carries on, to fill separately each of these small orders directly from the railroad tank cars, because of the great delay and expense in the way of freight charges incident to such a plan, and for the further reason that an extensive plant and apparatus is necessary, in order to properly and conveniently unload and receive the oil from said tank cars, and it would be impracticable, if not impossible, to have such apparatus and machinery at every point to which complainant ships said oil.'

"This certainly describes a business—describes a purpose for which the oil is taken from transportation, brought to rest in the state and for which the protection of the state is necessary, a purpose outside of the mere transportation of the oil. The case, therefore, comes

under the principle announced in American Steel & Wire Co. v. Speed, 192 U. S. 500.

"We have considered this case so far in view of the cases which involve the power of taxation. It may be that such power is more limited than the power to enact inspection laws. Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345, 356. The difference, if any exists, it is not necessary to observe. The cases based on the taxing power show the contentions of plaintiff in error are without merit; in other words, show that its oil was not properly in interstate commerce.

"As our conclusion is that no constitutional right of the oil company was violated by the enforcement of the law of 1899, it follows that no error prejudicial to the company was committed by the supreme court of Tennessee, and, for the reasons stated, its judgment is affirmed."

According to the facts stated in the amended complaint in the present case, the oil was brought into this state for the purpose of sale. It is not alleged in the complaint that the inspection was sought to be made while it was still in transit and before it came to a state of rest within the state. The inspection law, as above indicated, only requires that the oil be inspected and tested before it is sold or offered for sale. If the grain in the Bacon case, while it was in the elevator in Chicago, was no longer in interstate commerce, and the oil
14 in the General Oil Co. case had lost its character of interstate commerce while in the tanks at Memphis, Tennessee, it would seem to follow that a law which requires that the oil be inspected before it is "sold or offered for sale" does not interfere with interstate commerce. In Spaulding v. Adams County, 79 Wash. 193, four carloads of buggies had been shipped from Grinnell, Iowa, to Ritzville, this state. The buggies were shipped in a dismantled condition, and were unloaded from the cars in which they arrived, and carried to a warehouse rented by the appellants, where they were reassembled and kept until sold. On the arrival of the buggies in the city of Ritzville, the corporate authorities of Adams county caused them to be valued for assessment purposes, and caused a tax to be levied thereon. One of the questions in the case was whether the buggies had lost their character of interstate commerce at the time the assessment was made. The case was here upon the findings, and there was a controversy over the construction of certain words used therein. Spaulding contended that, according to the findings, the assessment was made prior to the time when the property was unloaded from the cars in which it had been carried into the state. The county contended that, according to its construction of the findings of the trial court, the assessment was not made until after the buggies had been unloaded from the cars. Speaking of the effect, if the findings were given the construction contended for by Spaulding, the court held that, even under that construction, the buggies had lost their character of interstate commerce. It was said:

"But we think the rule would not be different were the appellant's construction of the findings the correct construction. The property had reached its destination. It had come to its place of rest for final disposal and use, and was to remain there until finally disposed of by

the owner. As such, we think it constituted a part of the mass of the general property of the county, even while on the cars, and was thus subject to taxation under the provision of the statute quoted, since it was the intention of the owners to take it to a place of business to be temporarily occupied for its sale."

In the respondent's brief, the case of Foote v. Maryland, 232 U. S. 494, is much relied upon to support the judgment of the trial court, and the suggestion is made that that case modifies or overrules the General Oil Co. case, supra. In that case, the plaintiffs, D. E. Foote & Company, Incorporated, were engaged in the business of packing oysters at Baltimore, Maryland. The oysters were taken from the waters of Maryland, Virginia, and New Jersey. The
14 legislature of the state of Maryland had passed a law for the inspection of oysters, and it was made the duty of the inspectors to inspect all oysters in the district to which they were respectively assigned. It was there held that, as to the oysters shipped from Virginia and New Jersey, the inspection law placed a burden upon interstate commerce. The question in that case was whether articles in interstate commerce could be required to pay an inspection fee which was greatly in excess of the inspection cost. It was recognized that the state had the right to inspect articles in interstate commerce and require an inspection fee, when the fees collected did not unreasonably exceed the cost of the administration of the law. In that case, the General Oil Co. case, though decided only a few years previous, was not referred to. Neither was there any discussion as to when an article is, and when it is not, in interstate commerce. It seems from the opinion to have either been assumed or conceded that the inspection law of Maryland covered interstate commerce, so far as the oysters coming from other states were concerned. The question considered in the General Oil Co. case was, when had an article lost its character of interstate commerce and become a part of the mass of the property of the state. It seems obvious that the court, in the Foote case, did not intend to overrule the General Oil Co. case without referring to it, and without discussing the question involved in that case. Speaking of the excess of the inspection fees collected over the cost of inspecting the oysters, the court observed that the excess collected "may have been valid as a tax on property in Maryland, but was a burden on interstate commerce when levied upon oysters coming from other states." We are aware that the supreme court of Ohio, in Castle v. Mason, 110 N. E. 463, and the supreme court of North Dakota, in Bartles Northern Oil Co. v. Jackman, 29 N. D. 236, have placed a different construction upon the Foote case from that which we have. Both of these courts construed the Foote case as authority for holding that an oil inspection law passed by the legislatures of the two respective states was an unlawful interference with interstate commerce. While we entertain great respect for the opinions of both the supreme court of Ohio and of North Dakota, we are yet constrained to say that, it seems to us, those courts have not correctly interpreted the holding in the Foote case. The supreme court of Minnesota, in State v. Bartles Oil Co., 155 N. W. 1035, declined to follow the construction placed upon the Foote case by the supreme

courts of Ohio and North Dakota. That court was of the
14[10] opinion that the Foote case did not overrule the General Oil Co. case. Upon the question of interstate commerce, as already indicated, we think that the oil inspection law of this state does not interfere with the paramount authority of Congress to regulate such commerce.

The fourth question is whether section 1 of the 14th amendment of the Federal constitution, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty, or property, without due process of law; or article 1, section 3, of the constitution of the state of Washington, which provides for due process of law, are impinged by the enforcement of the oil inspection law. The law does not abridge the privileges or immunities of citizens of the United States, because it applies equally to all persons selling or offering for sale the articles mentioned in the statute, whether such persons be citizens of this state or other states of the Union. As to due process of law, no authorities are cited which would show that the enforcement of the law conflicts with that provision of the constitution, and we know of none which so hold. Neither is any reason suggested which would justify such a holding.

The fifth question is whether the oil inspection tax provided for conflicts with article 7, section 2, of the state constitution, which provides for "uniformity and equality" of taxation; or section 5, of the same article, which provides that "no tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same, to which it only shall be applied." It has become the settled doctrine of this state that the provisions of the state constitution, found in article 7, relative to taxation, refer to taxes upon property, and have no application to taxes upon trades, professions, or occupations, or to privilege or excise taxes. Fleetwood v. Read, 21 Wash. 547; Stull v. De Mattos, 23 Wash. 71; In re Garfinkle, 37 Wash. 650; Seattle v. King, 74 Wash., 277; State v. Sheppard, 79 Wash. 328; State v. Collins, post p. —.

The sixth question is, does the oil inspection law impose a tax upon property, or provide for a tax upon a business, occupation, or an excise tax. If it is a tax on property, the law could not be sustained because of the lack of uniformity and equality. On the other hand, if it is a tax on the business or occupation or privilege, or an excise tax, the law is not invalid unless there is some constitutional provision limiting the amount of such taxation.

14[11] In State v. Clark, 30 Wash. 439, it was held that the inheritance tax law, which provided for the taxation of inheritances, was not invalid by reason of exempting some and laying proportional taxes on others, since the charges provided for were upon the passing of the estate by succession, and not a tax upon property. It was there said:

"The objection urged here, that the statute is in conflict with §§ 1, 2, and 5 of article 7 of the state constitution, relating to taxation, is not tenable, because the charge made upon the passing of the estate is not a tax on property. It is an impost or excise on the right to pass

the estate and the privilege of the devisee to take. That it is not within the provision relating to the tax on property is well settled by practically unanimous authority."

In State v. Sheppard, 79 Wash. 328, the court considered an act of the legislature fixing a license fee to be collected from peddlers. It was there held that this license fee, or tax, was not a property tax.

The Constitution of the United States provides:

"No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

The Federal supreme court, in construing this section, holds that the direct tax there provided for is a property tax, as distinguished from an impost, excise, or tax on a business, occupation, or profession. In Thomas v. United States, 192 U. S. 363, that court had before it an act of Congress requiring the payment of a stamp tax upon memorandums or contracts of sale of certificates of stock. In answer to the contention that this was a property tax, it was said:

"The sale of stocks is a particular business transaction in the exercise of the privilege afforded by the laws in respect to corporations of disposing of property in the form of certificates. The stamp duty is contingent on the happening of the event of sale, and the element of absolute and unavoidable demand is lacking. As such it falls, as stamp taxes ordinarily do, within the second class of the forms of taxation."

In Patton v. Brady, 184 U. S. 608, it was held that an act of Congress providing for a tax of twelve cents per pound upon tobacco and snuff, however prepared, manufactured and sold, or removed for consumption or sale, was not a direct tax, and therefore was not in conflict with the Federal constitution. It was there said:

"It is true other counsel in their brief have advanced a very elaborate and ingenious argument to show that this is a direct
14[12] tax upon property which must be apportioned according to population within the rule laid down in the Income Tax cases, but, as we have seen, it is not a tax upon property as such but upon certain kinds of property, having reference to their origin and their intended use."

The payment of the fee required by the oil inspection act is not an absolute and unavoidable demand, but is to be paid only upon the contingency that the oil is sold or offered for sale. If neither the inheritance law nor the license law imposes a tax on property, and the corporation stamp tax, and the tobacco and snuff tax are not direct taxes, it would seem to follow that the oil inspection law did not impose a tax upon property as such, but only upon the privilege of selling or disposing of such property. Whether it is called an occupation tax, a tax upon the right to sell, or an excise tax, is immaterial. If the tax is not a property tax, there is no constitutional restraint upon the power of the legislature to require it. The state constitution is a limitation upon the actions and powers of the legislature, instead of a grant of power. So far as the power of the legislature is not limited by the constitution, it is unrestrained. In Fleetwood v. Read, supra, upon this question, the court observed:

"* * * the state constitution is a limitation upon the actions

and powers of the legislature instead of a grant of power, that the power of the legislature to tax trades, professions and occupations is, in the absence of constitutional restriction, a matter within its absolute control and resting entirely in sound legislative discretion."

In State v. Sheppard, supra, it was said:

"The only taxes mentioned in article 7, or elsewhere in the constitution are property taxes, and from the reading of that article as a whole, we are of the opinion that the limitation here sought to be invoked is no more applicable to this tax than the equality rule is applicable to the inheritance tax. This tax, like the inheritance tax, finds no mention in the constitution, and like the inheritance tax, is exacted by virtue of the inherent power of the legislature, unrestrained, we think, by any constitutional rule of the exercise of that power."

It may be true that, if the law is to be regarded purely as an exercise on the part of the legislature of the police power, the inspection fees must be limited to what is reasonably necessary to pay the cost of inspection, labeling, and administering the law, but upon this no opinion is expressed. Even if the law could not be sustained as an exercise of the police power, it yet is the duty of the court to sustain it under the power of the legislature to levy a tax not upon
14[13] property, since it is properly sustainable under that power.

In Stull v. De Mattos, 23 Wash. 71, it was held that an ordinance charging an auctioneer's license was valid as an exercise of the taxing power, even though it could not be upheld as a legitimate exercise of the power to regulate business.

In General Oil Co. v. Crain, supra, the oil inspection law of the state of Tennessee was considered as one involving the power of taxation. The court cannot concern itself with the purpose or motive which prompted legislative action, so long as that action does not conflict with any constitutional mandate. The enforcement of a law, passed in the exercise of power possessed by a coordinate branch of the government, cannot be restrained, even though the court may believe that the law is unjust, unreasonable, or, as a matter of public policy, unwise.

In McCray v. United States, 195 U. S. 27, the following observations appear:

"It is, however, argued if a lawful power may be exerted for an unlawful purpose, and thus by abusing the power it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the authority conferred by the Constitution, will be of no avail. This, when reduced to its last analysis, comes to this, that, because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse by one department of the govern-

ment of its lawful powers is to be corrected by the abuse of its power by another department.

"The proposition, if sustained, would destroy all distinction between the powers of the respective departments of the government, would put an end to that confidence and respect for each other which it was the purpose of the Constitution to uphold, and would thus be full of danger to the permanence of our institutions. * * *

"It is, of course true, as suggested, that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the government, where a wrong motive or purpose has impelled to the exertion of the power, that abuses of a power
14 conferred may be temporarily effectual. The remedy for this, however, lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power."

On one or two of the questions herein considered, other than the question of interstate commerce, there is dictum in State v. Bartles Oil Co., supra, and a holding in Collins v. Morris, not in harmony with the views we have expressed. To review those cases would unnecessarily extend this opinion, which has already seemingly become disproportionate in length. Suffice it to say that, in our opinion, the conclusions we have reached are not only sustained by the authorities, but have the better reason in their support.

The judgment will be reversed, and the cause remanded to the superior court with direction to dismiss the action.

MAIN, *J.*

We concur:
ELLIS, *C. J.*
MOUNT,
PARKER,
CHADWICK,
MORRIS,
FULLERTON, AND
HOLCOMB, *JJ.*

15 In the Supreme Court of the State of Washington, Wednesday, February 14, 1917.

No. 13657.

STANDARD OIL COMPANY, Respondent,

vs.

H. T. GRAVES and H. T. GRAVES, Commissioner of Agriculture of the State of Washington, Appellant.

Judgment.

This cause having been heretofore submitted to the court upon the transcript of the record of the superior court of Thurston county,

and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises, it is now on this 14th day of February, A. D. 1917, on motion of W. V. Tanner, Esquire, of counsel for appellant, considered, adjudged and decreed, that the judgment of the said superior court be and the same is hereby reversed, with costs; and that the said H. T. Graves have and recover of and from the said Standard Oil Company the costs of this action taxed and allowed at One Hundred & eleven & 25/100 dollars, and that execution issue therefor. And it is further ordered that this cause be remitted to the said superior court for further proceedings in accordance herewith.

16 Filed in Supreme Court of Washington, Feb. 23, 1917. C. S. Reinhart, Clerk. F. S. G.

In the Supreme Court of the State of Washington. En Banc.

No. 13657.

STANDARD OIL COMPANY, a Corporation, Plaintiff in Error,

vs.

H. T. GRAVES and H. T. GRAVES as Commissioner of Agriculture of the State of Washington, Defendants in Error.

Assignment of Errors on Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Washington.

Now comes the said plaintiff in error and respectfully submits that in the record and proceedings, decision and final judgment of the supreme court of the state of Washington in the above entitled cause there is manifest error, and plaintiff in error hereby makes assignment of said errors as follows, to-wit:

I.

The supreme court of the state of Washington erred in holding that the provisions of chapter 192 of the laws of the state of Washington relative to the inspection of oils, etc., and the amendment thereof, being chapter 60, laws of 1913, of the state of Washington,, are not in conflict with and in violation of the provisions of Article I, Section 8, Clause 3 of the Constitution of the United States, providing that: "The Congress shall have power * * * to regulate commerce with foreign nations and among the several states, * * *" because and for the reason that the provisions of said act of the legislature of the state of Washington do have the legal effect of regulating commerce among the several states as applied to the facts alleged in the complaint of plaintiff in error, in that it is engaged in the state of

California in the business of producing and buying crude
17 petroleum oil and of manufacturing and refining the same,
and of shipping products of such manufacture from its refineries in California into the state of Washington; and in that the provisions of said Chapter 192 require the payment of fees and charges for the inspection of said products, which fees and charges are so exorbitant, excessive and wholly disproportionate to the service rendered in the matter of such inspection or cost of administering the provisions of said act as violate- said constitutional provision, and the same operates as a burden on interstate commerce.

II.

The supreme court of the state of Washington erred in holding that the provisions of said chapter 192 and said amendment thereof are not in conflict with and in violation of the provisions of clause 2, section 10, article I of the Constitution of the United States, providing that "no state shall, without the consent of the Congress, lay any imposts or duty on imposts or exports, except what may be absolutely necessary for executing its inspection laws, etc.," and with clause 5, section 9, of article I of the Constitution of the United States, providing that, "No tax or duty shall be laid on articles exported from any state," in that the legal effect of said chapter 192 as applied to the facts alleged in the complaint of plaintiff in error, in the particular of providing for and requiring the inspection of oils, petroleum products, etc., from the state of California to the state of Washington, and requiring the payment of a schedule of fees so disproportionate to and largely in excess of the costs of such inspection and what is absolutely necessary for executing such inspection law as violate- the provisions of the federal constitution above referred to.

III.

The supreme court of the state of Washington erred in holding that the provisions of said chapter 192 of the legislature of the state of Washington and said amendment thereof are not in conflict with and in violation of the provisions of section 1, article XIV of the amendments of the constitution of the United States, providing that: "No
18 state shall make or enforce any law which shall abridge the
privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

BALLINGER, BATTLE, HULBERT & SHORTS, AND
PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiff in Error.

19 Filed in Supreme Court of Washington, Feb. 23, 1917. C. S. Reinhart, Clerk. F. S. G.

In the Supreme Court of the State of Washington. En Banc.

No. 13657.

STANDARD OIL COMPANY, a Corporation, Plaintiff in Error,

vs.

H. T. GRAVES and H. T. GRAVES as Commissioner of Agriculture of the State of Washington, Defendants in Error.

Petition for an Allowance of Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Washington and Prayer for Reversal.

To the Honorable O. G. Ellis, Chief Justice of the Supreme Court of the State of Washington:

Comes now Standard Oil Company, a corporation, respondent in this cause in this court, and plaintiff in error on Writ of Error to the Supreme Court of the United States, by its attorneys, R. A. Ballinger, Alfred Battle, R. A. Hulbert, B. C. Shorts, E. S. Pillsbury, Frank D. Madison and Oscar Sutro, and complains and alleges that in the above entitled matter on the 14th day of February, 1917, final judgment was rendered against your petitioner by the supreme court of the state of Washington, that being the highest court of law or equity in the said state of Washington, wherein it was adjudged that the provisions of chapter 192 of an act of the legislature of the state of Washington, approved March 15, 1907, and relating to the inspection of oils, are not in conflict with article I, section 8, clause 3, of the Constitution of the United States, or article I, section 10, clause 2 of the Constitution of the United States, or of article I, section 9, clause 3 of the Constitution of the United States, or of section 1, arti-

20 cle XIV, of the amendments to the Constitution of the United States, and that furthermore by said final judgment it was adjudged and decreed that the judgment of the superior court of the state of Washington for the county of Thurston overruling the demurrer of appellant (defendants in error) to the amended complaint of plaintiff (plaintiff in error) and restraining and enjoining defendants, their agents, deputies, and inspectors, from collecting the fees prescribed by said chapter 192 and chapter 161 of the laws of Washington of 1905 and from enforcing any of the provisions of either of said acts or any amendments of either of said acts with respect to respondent (plaintiff in error) or any of its business in the state of Washington, and declaring said acts of 1905 and 1907 and any amendments thereof void and unconstitutional so far as regards any of the provisions thereof relative to the collection of inspection or other fees therein mentioned from plaintiff (plaintiff in error), be

reversed and said cause remanded to the said superior court with direction to dismiss plaintiff's action, whereby manifest error has happened, to the great damage of petitioner.

Wherefore, petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the supreme court of the state of Washington and the judges thereof, to the end that the record in said matter may be removed unto the Supreme Court of the United States and the errors complained of by your petitioner may be examined and corrected and said judgment reversed and your petitioner granted the relief prayed for in its said complaint; and petitioner prays for a reversal of said judgment so rendered by the supreme court of the state of Washington, etc., and petitioner further represents that it desires to supersede or suspend the operation and effect of said judgment pending said appeal to the Supreme Court of the United States and until final judgment has been entered by the Supreme Court of the United States, and that the court make and enter herein an order fixing the amount of such bond to operate as a supersedeas as aforesaid, and continuing in force and effect the injunction entered by the superior court of the state of Washington for Thurston County in this case.

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BALLINGER, BATTLE, HULBERT & SHORTS, AND
PILLSBURY, MADISON & SUTRO,
Attorneys for Petitioner (Plaintiff in Error).

STATE OF WASHINGTON,
Supreme Court, ss:

Let the Writ of Error issue upon the execution of the supersedeas bond by Standard Oil Company to defendants in the sum of $50,000.00, which bond is to be approved by the undersigned and to operate as a supersedeas bond, and to continue in full force and effect pening this Writ of Error the injunction granted by the superior court of Thurston county in this cause.

Dated February 23rd, 1917.

OVERTON G. ELLIS,
Chief Justice of the Supreme Court of the State of Washington.

22 Filed in Supreme Court of Washington Mar. 7, 1917. C. S. Reinhart, Clerk. F. S. G.

In the Supreme Court of the State of Washington. En Banc.

No. 13657.

STANDARD OIL COMPANY, a Corporation, Plaintiff in Error,

vs.

H. T. GRAVES and H. T. GRAVES as Commissioner of Agriculture of the State of Washington, Defendants in Error.

Supersedeas Bond on Writ of Error from Supreme Court of the United States to Supreme Court of the State of Washington.

Know all men by these presents: That we, Standard Oil Company, a corporation, as principal, and American Surety Company of New York a corporation organized under the laws of the state of New York and authorized to transact the business of a surety company in the state of Washington, as surety, are held and firmly bound unto H. T. Graves and H. T. Graves as commissioner of agriculture of the State of Washington, defendants in error above named, in the just and full sum of fifty thousand dollars ($50,000) for which sum to be paid to the said obligees, their successors, representatives, heirs, executors, administrators and assigns we do bind ourselves, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 6th day of March, 1917.

The condition of this obligation is such, That whereas, a Writ of Error to the Supreme Court of the United States was issued in the above entitled action by the supreme court of the State of Washington; and

Whereas, the amount of the bond to be executed by plaintiff
23 in error to operate as a supersedeas bond has been fixed by O. G. Ellis, Chief Justice of the Supreme Court of the State of Washington, at the sum of fifty thousand dollars ($50,000), and when executed to continue in full force and effect, pending said Writ of Error, the injunction order made in this cause by the superior court of Thurston county.

Now, therefore, if the above named Standard Oil Company, a corporation, shall prosecute its Writ of Error to effect and answer and pay all damages and costs and just damages for delay, costs and interest on the appeal, and all oil inspection fees that have or may accrue, and all costs and damages that may accrue to defendants in error or either of them by reason of said injunction remaining in force, if it

fails to make its plea or writ of error good, then this obligation shall be void, otherwise to remain in full force and effect.

STANDARD OIL COMPANY, A CORPORATION,
By JOHN McLEAN,
District Sales Manager and Attorney in Fact.

[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK,
By S. H. MELROSE, *Resident Vice-President.*

Attest:

A. E. KRULL,
Resident Assistant Secretary.

Approved by me this 7th day of March, 1917.

OVERTON G. ELLIS,
Chief Justice of the Supreme Court of the State of Washington.

24 In the District Court of the United States for the Western District of Washington, Northern Division.

13657.

STANDARD OIL COMPANY, a Corporation, Plaintiff in Error,

vs.

H. T. GRAVES and H. T. GRAVES as Commissioner of Agriculture of the State of Washington, Defendants in Error.

Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Washington.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Washington, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Washington before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Standard Oil Company, a corporation, respondent (plaintiff in Superior Court), and H. T. Graves and H. T. Graves as Commissioner of Agriculture of the State of Washington, appellants, (defendants in Superior Court), and which suit is No. 13657, en banc, on the records of said court, wherein was drawn in question the validity of statutes of and the authority exercised under said state, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their

validity, and wherein was drawn in question the construction
25 and application of clauses of the Constitution of the United States, and the decision was against the right, privilege or exemption especially set up and claimed under such clauses of such constitution, a manifest error hath happened, to the great damage of the said Standard Oil Company, a corporation, as by its complaint appears, we being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same at Washington on the 7th day of May, 1917, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness The Honorable E. D. White, Chief Justice of the Supreme Court of the United States, this 8th day of March, in the year of our Lord one thousand nine hundred and seventeen.

[Seal of the United States District Court, Western District of Washington.]

FRANK L. CROSBY,
Clerk of the District Court of the United States for the Western District of Washington, Northern Division.

Allowed this 9th day of March, 1917.

OVERTON G. ELLIS,
Chief Justice of the Supreme Court of the State of Washington.

26 [Endorsed:] No. —. In the United States District Court for the Western District of Washington, Northern Division. Standard Oil Company, a corporation, Plaintiff in Error, v. H. T. Graves and H. T. Graves as Commissioner, etc., Defendants in Error. Writ of Error. Ballinger, Battle, Hullert & Shorts, Attorneys for Plaintiff in Error, Rooms 901-907 Alaska Building, Seattle, Wash.

27 In the Supreme Court of the State of Washington. En Banc.

No. 13657.

13657.

STANDARD OIL COMPANY, a Corporation, Plaintiff in Error,

vs.

H. T. GRAVES and H. T. GRAVES as Commissioner of Agriculture of the State of Washington, Defendants in Error.

Citation to Defendants in Error upon Removal from the Supreme Court of the State of Washington to the Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

To H. T. Graves and H. T. Graves as Commissioner of Agriculture of the State of Washington, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within sixty days from the date hereof, pursuant to a Writ of Error filed in the office of the Clerk of the Supreme Court of the State of Washington, wherein Standard Oil Company, a corporation, is plaintiff in error and you are the defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in said Writ of Error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Washington, this 9th day of March, 1917.

[Seal of the Supreme Court, State of Washington.]

OVERTON G. ELLIS,
Chief Justice of the Supreme Court of the State of Washington.

Attest:

C. S. REINHART,
Clerk of the Supreme Court of Washington.

28 OLYMPIA, WASHINGTON, March 9th, 1917.

The undersigned, Attorneys of Record for Defendants in Error in the above entitled cause, hereby acknowledge due service of the above citation and enter *our* appearance in the Supreme Court of the United States. Copy of within citation received at Olympia, Washington, this 9th day of March, 1917.

W. V. TANNER,
Attorneys for H. T. Graves and H. T. Graves as Commissioner of Agriculture of the State of Washington, Defendants in Error.

29 [Endorsed:] No. 13657. In the Supreme Court of the State of Washington. En Banc. Standard Oil Company, a corporation, Plaintiff in Error, vs. H. T. Graves and H. T. Graves as Commissioner, etc., Defendants in Error. Citation. Ballinger, Battle, Hulbert & Shorts, Attorneys for Plaintiff in Error, Rooms 901-907 Alaska Building, Seattle, Wash.

30 In the Supreme Court of the State of Washington.

No. 13657.

STANDARD OIL COMPANY, a Corporation, Plaintiff in Error,

vs.

H. T. GRAVES and H. T. GRAVES as Commissioner of Agriculture of the State of Washington, Defendants in Error.

Clerk's Certificate.

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true and correct transcript of the records and proceedings in the above entitled cause, together with all things concerning the same, and that in pursuance of the writ of error heretofore filed in this cause I now transmit the same, together with the original writ of error and the original citation to the Supreme Court of the United States.

In testimony whereof, I have hereunto set my hand and affixed the seal of said supreme court of the State of Washington at Olympia this 13th day of March, 1917.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART,
Clerk of the Supreme Court of the State of Washington.

Endorsed on cover: File No. 25,920. Washington Supreme Court, Term No. 1090. Standard Oil Company, plaintiff in error, vs. H. T. Graves and H. T. Graves as commissioner of agriculture of the State of Washington. Filed April 24th, 1917. File No. 25,920.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1918

No. ~~1098~~ 177

STANDARD OIL COMPANY,
Plaintiff in Error,

vs.

H. T. GRAVES and H. T. GRAVES as Commissioner of Agriculture of the State of Washington,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

E. S. PILLSBURY,
F. D. MADISON,
H. D. PILLSBURY,
ALFRED SUTRO,
OSCAR SUTRO,
R. A. BALLINGER,
ALFRED BATTLE,
BRUCE C. SHORTS,
Attorneys for Plaintiff in Error.

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STANDARD OIL COMPANY,
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H. T. GRAVES and H. T. GRAVES as Commissioner of Agriculture of the State of Washington,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Plaintiff in error brought this action in the Superior Court of the State of Washington for Thurston County, to enjoin the defendant in error, Commissioner of Agriculture of that state, from collecting from the plaintiff in error the fees prescribed by the state statute known as "The Oil Inspection Act". Plaintiff prayed for a decree adjudging the act void and unconstitutional. The defendant's demurrer to the amended complaint having been overruled, and the defendant electing not to answer, judgment was entered in the Superior Court

> "The plaintiff maintains in the State of Washington wharves and docks, tanks, warehouses, buildings, machinery, horses and wagons, and other equipment for receiving, shipping, handling, selling and otherwise distributing said products shipped as aforesaid from the State of California into the State of Washington" (ib. Par. IV, Rec. p. 2).

The fees collected under the act have been increasing rapidly from the years 1907 to 1915. In 1908 the fees collected from plaintiff in error amounted to $18,527.61; in 1914 to $58,004.13. The total fees collected under the act in 1905 (when this legislation was first in force) amounted to $5,693.91; in 1907 to $19,084.29; in 1908, under the new statute, to $24,493.93; in 1914 to $79,399.66. The expense of administration, on the other hand, has remained fairly constant, amounting in 1908 to $8,684.87. Six years later, in 1914, the expense figure was $8,553.75. Thus the margin of profit from the operation of the act has increased greatly in recent years, the profit for 1907 being $11,532.59, while for 1914 it was $70,785.91! The total expense of administration of the staute from 1905 to 1914 was $80,103.37; the total receipts for the same period $335,776.30, a profit to the state of $255,672.93! (Rec. pp. 2 and 3). It further appears that the margin of profit to the state will continue to increase (Amended Complaint, Par. VII, Rec. p. 4).

Under these facts it is alleged that the fees provided for in the statute are disproportionate to the services rendered thereunder and are

> "excessive, oppressive and not justified by the requirements and cost of a reasonable inspection

and branding of the products hereinbefore referred to or the cost of administering the provisions of said act of 1907 and said act of 1913 and materially and unreasonably exceed said cost" (ib. Par. VII, Rec. p. 4).

It is further alleged that the defendant in error is about to institute criminal proceedings against the plaintiff in error unless it pays these fees, and will prevent plaintiff in error from selling in the State of Washington its products manufactured in the State of California and shipped into the State of Washington as alleged in the pleading (ib. Par. IX, Rec. p. 4).

It was pleaded as a matter of fact that the fees, by reason of the great excess in the amounts thereof over the cost of inspecting and branding the products involved and of administering the provisions of the acts referred to, are in violation of the constitution of the United States, and more particularly (amongst other clauses) of clause 3, sec. 8, art. I, and of sec. 1 of the fourteenth amendment to the constitution of the United States (ib. Par. VIII, Rec. p. 4).

THE ISSUE.

The issue is whether the State of Washington, in which petroleum is neither produced nor its products manufactured, can demand excessive inspection fees or levy an excise or occupation tax on the original sale in that state of petroleum and its products.

The Supreme Court of Washington, in reply to the contention that the inspection fees were excessive, took

the ground that it was unnecessary to consider the validity of the statute as an inspection law, because it was sustainable as an excise or occupation tax on sales of oil in Washington. At the same time the court held that the statute could not be sustained as a property tax because as such it would violate the constitution of the state (Opinion, Rec. p. 18).

Under the statute, oil once inspected is free to move in the channels of trade. Therefore, the so-called occupation tax is payable only by those who seek to make the original sale of oil in Washington. Plaintiff in error takes the position:

First. That as an inspection law the act is invalid because it operates as a revenue measure; the fees are grossly excessive; their exaction is a discrimination against interstate commerce and a burden on it.

Second. That as a statute levying an occupation tax on original sales of oil shipped into the State of Washington from other states the act burdens interstate commerce and is discriminatory in its nature; and

Third. That as a purported tax on the occupation of making original sales of oil in Washington, the tax is unequal and contrary to the fourteenth amendment; in other words, that the classification between those making first sales and those making subsequent sales of the same product is arbitrary and not sustainable by reference to a reasonable exercise of the taxing power of the state. It may be noted here that the legislature of Washington contemplated no such discrimination. The legislature provided for inspection

fees. The state court, to sustain the statute, created a classification which distinguishes the occupation of making original sales of oil from the occupation of making subsequent sales of the same oil. The state court held that this statute taxed the former occupation. This somewhat fantastic classification is the result therefore not of a legislative purpose but of the attempt to sustain an inspection fee as an occupation tax.

Argument.

I.

THE ACT IS INVALID BECAUSE IT LEVIES EXCESSIVE INSPECTION FEES ON OIL AND ON ITS PRODUCTS BROUGHT INTO WASHINGTON AS A CONDITION OF THEIR SALE IN THAT STATE.

Our contention that these fees are excessive is conceded by the demurrer and in substance by the opinion of the State Supreme Court (Rec. p. 18). The concession, we believe, disposes of the case. The Supreme Court of the state met the point by saying:

> "It may be true that if the law is to be regarded purely as an exercise on the part of the legislature of the police power, the inspection fees must be limited to what is reasonably necessary to pay the cost of inspection, labeling and administering the law, but upon this no opinion is expressed. Even if the law could not be sustained as an exercise of the police power, it yet is the duty of the court to sustain it under the power of the legislature to levy a tax not upon property, since it is properly sustainable under that power." (Rec. p. 18.)

We submit that the law cannot be regarded as anything other than an inspection act. It is so entitled.

Inspection is its purpose. Even if its purpose were disguised, this court would look through the form to the substance and consider the act in the light of the actual intent and operation of the statute.

Is it then a statute sustainable under the police power of the state as an inspection law?

It may be conceded at the outset that the police power of the states is sufficient to justify reasonable inspection laws and their application to products of interstate commerce.

Leisy v. Hardin, 135 U. S. 100;
McLean v. Denver & Rio Grande R. R., 203 U. S. 38;
Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345;
Asbell v. Kansas, 209 U. S. 251.

The authority of a state to pass a bona fide inspection law operative upon articles moving in interstate commerce is therefore not disputed. Nor is it here questioned that the inspection of oils and other volatile products of petroleum when so provided for is a valid exercise of such power. But it is our earnest contention that the limit of such authority is, as was very recently stated by this court through its Chief Justice "to impose a fee solely to recompense the state for the expenses properly incurred in enforcing the authorized inspection" (*Red "C" Oil Co. v. North Carolina*, 222 U. S. 380 at 394).

It would seem that discussion of the validity or invalidity of a state statute levying excessive inspection

fees as a condition to the sale of articles brought in from other states has been foreclosed by the decisions of this court.

A case which, we submit, is not distinguishable from the case at bar is *Foote v. Maryland*, 232 U. S. 494. In that case a Maryland oyster law required that inspectors should inspect all oysters in the district to which the inspector was assigned, and that a charge of one cent per bushel should be levied, to help defray the expenses of such inspector and the other expenses of the fishery force, upon all oysters unloaded from vessels at the place where said oysters were to be no further shipped in bulk in vessels. The fee was to be charged equally to the buyer and seller, and, if not paid, the property of the party indebted was to be levied on and sold, as in cases of taxes in default.

The plaintiffs were purchasers of oysters brought in from other states, and having refused to pay the inspection charge, the litigation followed. This court held that as the inspection fee was excessive, it was an unconstitutional burden on commerce in respect to the oysters shipped from other states, though possibly sustainable as a tax on oysters in Maryland. The court said that the collection of fees to pay for the necessary expenses of inspection was permitted, and that to that extent commerce could be lawfully burdened, but that the power to collect fees for these expenses could not be used as a cloak to pay for services not incident to inspection, and that an inspection fee which was intended to pay the expenses of policing as well as inspection would be unconstitutional.

The court next considered the question whether it would inquire into the reasonableness of the fee. Even where the inspection fee seemed excessive, the court would not immediately interfere because of the presumption that the legislature would reduce the fees to a proper sum. The court proceeded (pp. 504-505):

> "But when the facts show that what was known to be an unnecessary amount has been levied, or that what has proved to be an unreasonable charge is continued, then, they (the courts) are obliged to act in the light of those facts and to give effect to the provision of the constitution prohibiting the collection by a state of more than is necessary for executing its inspection laws. In such inquiry they treat the fees fixed by the legislature for inspection proper as *prima facie* reasonable and do not enter into any nice calculation as to the difference between cost and collection; nor will they declare the fees to be excessive unless it is made clearly to appear that they are obviously and largely beyond what is needed to pay for the inspection services rendered. Still, effect must be given to the provision of the constitution, which, in unusual and emphatic terms, permits the state to collect only what is 'absolutely necessary'. If, therefore, it is shown, that the fees are disproportionate to the service rendered; or, that they include the cost of something beyond legitimate inspection to determine quality and condition, the tax must be declared void because such costs, by necessary operation obstruct the freedom of commerce among the states. McLean v. Denver & Rio Grande R. R. Co., 203 U. S. 38; Brimmer v. Rebman, 138 U. S. 78, 83; Postal Telegraph-Cable Co. v. Taylor, 192 U. S. 64; Patapsco Co. v. North Carolina, 171 U. S. 345, 354; Red 'C' Oil Co. v. North Carolina, 222 U. S. 380, 394; Savage v. Jones, 225 U. S. 501."

Thus it was held by the court that the question of reasonableness could be considered in the light of the

practical operation of the law, and of the permanent relation between the amount collected and the cost of inspection. Reference was made to the opinion of the Court of Appeals of Maryland, that a court could not decide whether a charge under an inspection law is or is not excessive. The Maryland court based its holding on an intimation in *Turner v. Maryland*, 107 U. S. 38; but it was definitely decided in the Foote case that that suggestion was opposed to the distinct rulings of this court in the other cases above cited. The court decided that:

> "It is the duty of the courts to pass upon the question, so as to protect the private citizen against the payment of inspection fees, larger than those authorized by the constitution." (p. 507.)

The statute was held void in the light of the operation of the act. The court concluded:

> "The excess collected may have been valid as a tax on property in Maryland, but was a burden on interstate commerce when levied upon oysters coming from other states. This fact renders the whole tax void, because there is no claim that the intrastate commerce can be separated from the interstate shipments; or that the legislature would have taxed one and left the other untaxed." (p. 508.)

The decision of the Supreme Court of Maryland sustaining the act was reversed.

In *Red "C" Oil Co. v. North Carolina*, 222 U. S. 380 (172 Fed. 695), the act concerned an inspection fee on "all kerosene or other illuminating oils, *sold or offered for sale*, in the state".

The bill averred that the complainant was a large shipper of illuminating oils from the State of Maryland into the State of North Carolina, and that it did an extensive business in North Carolina in dealing in such oil. It was conceded both in the court below and in the Supreme Court that this state of facts was sufficient to protect the business of the complainant against excessive license taxes, or other burdens upon the business which it did. It was assumed, and properly so, that the business described in the bill of complaint was interstate commerce. The only question was whether the facts justified the finding that the inspection fees were unreasonable. It was noted in that case that all the kerosene oil sold and used in North Carolina was manufactured or was the product of crude petroleum brought in from other states (172 Fed. 700).

It was contended by the complainant that "the charge or 'tax' was not for the purpose of defraying the cost of inspection of oil, but was imposed for revenue upon the goods of complainant shipped into the State of North Carolina from the State of Maryland, and was hence in conflict with the commerce clause and the Fourteenth Amendment" (222 U. S. 383). This court held that it could not be said from the face of the act that the tax was so excessive as to conclusively evidence the unconstitutionality of the burden. The action having been brought within two days from the time the statute went into effect, the presumption would be in favor of the good faith of the statute and that should experience prove the fee too large it would be pre-

sumed that "the necessary correction will be made *to cause the act to conform to the authority possessed, which is to impose a fee solely to recompense the state for the expenses properly incurred in enforcing the authorized inspection*" (p. 394; italics ours). It will be noted that the statute in the Red "C" Oil case was applicable to petroleum products "sold or offered for sale" in the State of North Carolina. The facts of the case are practically on all fours with those in the instant case. The only difference is that here the inspection fees are admitted by the demurrer to be unreasonable; in the Red "C" case their unreasonableness had not been established. But the principle of the decision in the Red "C" case, we submit, controls the case at bar.

The Oil Inspection Act of the State of Washington of 1907 placed the fees at the same rate that they had been under the act of 1905 (Stat. Wash. 1905, Chap. 161). The balance between receipts and disbursements under the latter act had been growing with an increasing tendency, and with the succeeding years the disproportion between receipts and expenditures had become very marked. When the legislature of 1913 met and amended the act to replace the Inspector with the Commissioner of Agriculture, this disparity had become great; the collections were six times as much as the expenditures. The act (which undoubtedly was at the time of its original passage in 1905 a bona fide inspection law) has become unconstitutional by reason of the great disparity which has resulted between the charges and expenditures and which was so palpable at the time of the commencement of this suit. That a statute may

be established as unconstitutional by its operation and practical effect rather than by the language of the act is the accepted doctrine of this court.

Minnesota v. Barber, 136 U. S. 313, 319;
Brimmer v. Rebman, 138 U. S. 78;
Poindexter v. Greenhow, 114 U. S. 270;
Northern Pacific Ry. Co. v. North Dakota, 216 U. S. 579; same, 236 U. S. 585;
Wilcox v. Consolidated Gas Co., 212 U. S. 19.

The substance of these decisions is stated in *Castle v. Mason*, 110 N. E. 463, 465, as follows:

> "A law may be within the pale of constitutional authority when originally passed, yet because of its future operations it may directly contravene the organic law."

There is no basis to argue that the legislature will reduce these fees to conform with the limit of its constitutional authority, for in amending the statute in 1913 the fees were not reduced. On the other hand, it must be presumed that the legislature was familiar with the functions of its own government (*State v. Standard Oil Company*, 161 N. W. 537). Furthermore, the state's attorney has not claimed that it must be assumed that the legislature will reduce these fees. He stands upon the bold claim of a right to collect such fees however much they exceed the cost of the inspection service, and however much the resulting profit may increase.

Article 1, section 10, cl. 2, of the constitution, which provides:

> "No state shall, without the consent of the Congress, lay any imposts or duties on imports or

> exports except what may be absolutely necessary for executing its inspection laws."

has by analogy been applied to interstate commerce. Under the doctrine that "the power to tax is the power to destroy," the implied prohibition has been read into the Constitution against a state laying a tax upon the importation of an article from a sister state; but this does not mean that a state may not impose such a reasonable charge or tax as is necessary to execute its inspection laws.

Mr. Justice Bradley, in *Neilson v. Garza*, 2 Woods 287, Fed. Cas. No. 10,091, said:

> "If any state, as a means of carrying out and executing its inspection laws, imposes any duty or impost on imports or exports, such impost or duty is void if it exceeds what is absolutely necessary for executing such inspection laws."

As was pointed out in the Red C. Oil Mfg. Co. case, in 172 Fed. 695, 706:

> "This case is cited, and the language quoted with approval, in Patapsco Guano Co. v. Board of Agriculture, supra. Thus the limitation upon the amount of a tax imposed by an inspection law upon an article which is the subject of interstate commerce is the same as that fixed by the Constitution in article 1, sec. 10, upon 'imports'."

At an earlier stage of our judicial history the question whether the courts would pass on the reasonableness of an inspection fee was in doubt. In *Patapsco Guano Co. v. Board of Agriculture of North Carolina*, 52 Fed. 690, Judge Seymour came to the conclusion that the inspection fee there under consideration could not

be decided to be unconstitutional simply on the ground of alleged excess, and based his decision on *Turner v. Maryland*, 107 U. S. 38.

Similarly the court of appeals of Maryland in the Foote case (82 Atl. 380) questioned the right of the courts to pass upon the reasonableness of inspection fees. *Turner v. Maryland*, 107 U. S. 38, was there also referred to. But the observations in *Turner v. Maryland* were confined to those cases in which an inspection statute was not a mere cover for revenue. The court said:

> "As is suggested in Neilson v. Garza, 2 Woods 287, by Mr. Justice Bradley, it may be doubtful whether it is not exclusively the province of Congress, and not at all that of a court, to decide whether a charge or duty, under an inspection law, is or is not excessive. There is nothing in the record from which it can be inferred that the State of Maryland intended to make its tobacco-inspection laws a mere cover for laying revenue duties upon exports." (107 U. S. 55).

In *Turner v. Maryland* the statute concerned tobacco grown in Maryland, and was designed to provide for the inspection of tobacco to be exported from the state. The opinion was based upon the conclusion that not only was the provision for inspection a reasonable exercise of the power of inspection, but that the power was exercised with reference to tobacco which had not yet become the subject of interstate commerce. The power of the state to inspect tobacco grown and produced within its own borders was held to be clear and not affected by the fact that the tobacco might be in-

tended for export. The court was careful to conclude (p. 58-9):

> "In this case no inspection is involved except that of tobacco grown in Maryland, and we must not be understood as expressing any opinion as to any provisions of the Maryland laws which refer to the inspection of tobacco grown out of Maryland."

The authority of the courts over this subject was defined in *McLean v. Denver & Rio Grande R. R.*, 203 U. S. 38, 55. Mr. Justice Day said:

> "The law being otherwise valid, the amount of the inspection fee is not a judicial question; it rests with the legislature to fix the amount, and it can only present a valid objection when it is shown that it is so unreasonable and disproportionate to the services rendered as to attack the *good faith of the law.* Patapsco Guano Co. v. North Carolina Board of Agriculture, 171 U. S. 345." (Italics ours.)

In a recent case Mr. Justice McReynolds thus expressed the views of the court:

> "The reasonableness of the state's action is always subject to inquiry in so far as it affects interstate commerce, and in that regard it is likewise subordinate to the will of Congress."

And, again:

> "The amount of the charges and the method of collection are primarily for determination by the state itself; and so long as they are reasonable and are fixed according to some uniform, fair and practical standard, they constitute no burden on interstate commerce."
>
> *Hendrick v. Maryland*, 235 U. S. 610, 622, 624.

So far as inspection laws are concerned, the question was however finally set at rest by this court in *Foote v. Maryland*, 232 U. S. 494. There it was definitely decided, as was also held in the Red "C" Oil case (supra) that inspection laws will not be sustained if found by the courts to levy excessive fees.

We append a list and note of some cases in which inspection fees have been held to be a valid or invalid burden on interstate commerce, according to whether investigation by the courts showed them to be reasonable, or excessive and obviously disproportionate, to the service rendered.

1. *Foote & Co. v. Maryland*, 232 U. S. 494: Statute providing for inspection of oysters when no longer shipped in bulk held unconstitutional as applied to interstate shipments because the fees exacted were disproportionate to the cost of the services rendered.

2. *Red "C" Oil Company v. North Carolina*, 222 U. S. 380: Inspection of oils prior to sale or offer for sale held valid because the fees charged could not be said to have been disproportionate to the services rendered.

3. *Patapsco Guano Co. v. North Carolina*, 171 U. S. 345: Inspection of fertilizers prior to sale or offer for sale held valid because fees charged were merely to defray the cost of such inspection.

4. *American Fertilizing Co. v. Board of Agriculture*, 43 Fed. 609. Inspection of fertilizers prior to sale

or offer for sale held invalid because fees were disproportionate to the costs of inspection.

5. *Postal Telegraph Co. v. Taylor,* 192 U. S. 64; *Same v. New Hope,* 192 U. S. 55: License fee on telegraph poles held to be in restraint of commerce and unconstitutional when such fees were disproportionate to the costs of inspection and policing.

6. *Castle v. Mason* (Ohio, 1915), 110 N. E. 463: Statute requiring inspection of oils before sale or offering same for sale held void as burdening interstate commerce because the fees charged were excessive. *Foote v. Maryland,* supra, followed.

7. *Bartles etc. v. Jackman* (North Dakota, 1915), 150 N. W. 576: Oil inspection statute operative upon goods prior to sale or offer for sale held unconstitutional upon the same grounds we urge, where the fees were excessive. *Foote v. Maryland,* supra, followed.

8. *State v. Cumisky* (Kansas 1916), 155 Pac. 47: Oil inspection statute similar to preceding, held unconstitutional on the ground that the fees were excessive.

9. *State v. Standard Oil* (Nebraska, 1917), 161 N. W. 537: Oil inspection statute similar to each of preceding and identical with statute here under consideration except that the fees were slightly less, was held unconstitutional as being a burden on interstate commerce on the ground that the fees were excessive. *Foote v. Maryland,* supra, followed.

10. *Foote v. Stanley* (Maryland, 1911), 81 Atl. 511: Statute similar to the one held invalid in *Foote v. Maryland*, except that the fee was twice as great, was held invalid by the Supreme Court of Maryland for the reasons given by this court in *Foote v. Maryland*.

11. *State v. Bartles Oil Co.* (Minn., 1916), 155 N. W. 1035, oil inspection act held valid because fees were not shown to have been excessive. Application of *Foote v. Maryland* recognized.

Thus the similar oil inspection statutes of Ohio, North Dakota and Nebraska have been declared unconstitutional by the Supreme Courts of those states upon the express authority of the decision of this court in *Foote v. Maryland*.

We submit that on the same authority the state court in this case also should have held that the statute is an unconstitutional burden on commerce, and invalid as to shipments made by this plaintiff in error into the State of Washington.

II.

THE INSPECTION STATUTE UNDER CONSIDERATION IS NOT SUSTAINABLE AS AN OCCUPATION TAX.

1. It will not be so construed.

2. As such, it is an unconstitutional burden on interstate commerce.

3. As such, it is violative of the fourteenth amendment to the Constitution.

1. The act in question will not be construed as an occupation, excise or privilege tax.

The point thus presented for argument arises on a novel record. The cases are numerous that an invalid revenue measure will not be sustained under the guise of an inspection statute or other exercise of the police power. Will an invalid inspection statute be clothed by the courts with the guise of a revenue measure?

It is an established fact that the State of Washington produces no oil and manufactures no products of oil (infra). Therefore, the issue presented is whether the State of Washington can by excessive inspection fees burden the sale of petroleum and its products within the limits of the State of Washington, and, secondly, whether this condition upon the sale of petroleum and its products in the State of Washington will be sustained as an occupation tax by reason of the state court's construction of the statute.

No sale can be made of any plaintiff's products in the State of Washington without compliance with a condition unreasonable and unsustainable under the police power of the state. Can this condition then be sustained as a lawful exercise of the taxing power? If the purpose and intent of the legislature could thus plainly be ignored, and a different legislative act created by the courts and the statute in question converted into a taxing statute, the resulting tax is still an unconstitutional burden on commerce. Indeed, the police

power is less restricted than the taxing power in relation to objects of interstate commerce. It was only by confusing the taxing power of a state over property within its limits, with its want of power to tax sales in interstate commerce that the Supreme Court of Washington could support the statute under the taxing power.

We are not unmindful of the repeated decisions of this court that it will consider itself bound by the construction given to a state statute by a state court. But this court has had occasion very recently to define the limitations of that rule. In *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 294, Mr. Justice Pitney, speaking for the court, said:

> "As in other cases of this character, we accept the decision of the state court of last resort, respecting the proper construction of the statute, but are in duty bound to determine the questions raised under the federal Constitution upon our own judgment of the actual operation and effect of the tax, irrespective of the form it bears or how it is characterized by the state courts. Galveston, Harrisburg, etc., Ry Co. v. Texas, 210 U. S. 217, 227, 28 Sup. Ct. 638, 52 L. Ed. 1031; St. Louis S. W. Ry. v. Arkansas, 235 U. S. 350, 362, 35 Sup. Ct. 99, 59 L. Ed. 265; Kansas City Ry. v. Kansas, 240 U. S. 227, 231, 36 Sup. Ct. 261, 60 L. Ed. 617."

This court has never considered itself bound by the apparent meaning of a statute, but has always looked to the substance and effect of a statute.

Home Savings Bank v. Des Moines, 205 U. S. 503;

Home Ins. Co. v New York, 134 U. S. 594, 598.

Will the rule be different when a state court rejects the obvious purpose of a state statute and attributes to

the state legislature a purpose at variance with the avowed object, substance and effect of the act? Will this court be bound by a decision which, in the language of Mr. Chief Justice White, in the Red "C" oil case, imputes to the legislature of State of Washington

> "An attempt to do one thing under the guise or pretense of doing another?"

In *Galveston, Harrisburg, etc. Railway v. Texas,* 210 U. S. 217, the court held that a statute of Texas which imposed a tax on railroad companies equal to one per cent, of their gross receipts, violated the interstate commerce clause as to those companies whose receipts include receipts from interstate business. It was sought to sustain the tax as an occupation tax. The Supreme Court of the State of Texas so designated it. However, Mr. Justice Holmes said:

> "Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form." Citing *Stockard v. Morgan,* 185 U. S. 27; *Asbell v. Kansas,* 209 U. S. 251.
>
> "We are of opinion that the statute levying this tax does amount to an attempt to regulate commerce among the states."

Referring to the fact that the tax was "equal" to one per cent. of gross receipts and not a tax of one per cent. of the same, Mr. Justice Holmes said:

> "This is merely an effort to reach the gross receipts, not even disguised by the name of an occupa-

tion tax, and in no way helped by the words 'equal to'."

The purpose of a statute is to be determined by its natural and reasonable effect, and such purpose governs the determination of its validity.

Collins v. State, 171 U. S. 30.

We submit that it is absolutely impossible to read this act as a taxing statute of any kind. To so uphold it is to say that it may be passed for one purpose and used for another, a thing which this court has emphatically declared cannot be done. *Postal Telegraph Co. v. Taylor*, 192 U. S. 64. That case is authority from this court that no such principles of judicial interpretation as were here used by the state court will be sustained.

There the city had passed under its police power, as the state has under the same power in the present case, an inspection and policing measure. It was effective upon interstate commerce. The license fee imposed upon the property of the carrier was grossly disproportionate to the cost of the services rendered. The court reaffirmed the rule that such fees when operative upon interstate commerce must be reasonable and not disproportionate to the cost of the services rendered. This was the rule theretofore declared in

Western Union Tel. Co. v New Hope, 187 U. S. 419;

Atl. & Tel. Co. v. Philadelphia, 190 U. S. 160;

Postal Tel. & Cable Co. v. New Hope, 192 U. S. 55.

Having found the ordinance bad upon all the grounds upon which such an ordinance could be sustained as a police measure, the court refused to blind its eyes to the real purpose for which the ordinance was enacted and held it invalid for any purpose. Mr. Justice Peckham speaking for the court said:

> "To uphold it in such a case as this is to say that it may be passed for one purpose and used for another; passed as a police inspection measure and used for the purpose of raising revenue; that the enactment as a police measure may be used as a mere subterfuge for the purpose of raising revenue * * * It is thus declared legal upon a basis and for a reason that do not exist in fact." (192 U. S. 72.)

The purpose of the oil inspection act of the State of Washington expressed in its title was direct and certain and pertained to the legitimate purposes of such an act when enacted in all good faith. There is expressed no intent to tax. The body of the statute faithfully conforms to the purposes stated. It creates an inspector of oils, provides for his appointment, his salary, his bond; for a deputy inspector, his salary and bond; gives him the right to go upon the premises of dealers in such products and makes it his duty to examine and test these products; requires all such products to be so tested and inspected before being sold or offered for sale to the people of the state; provides for the branding, rejection, chemical examination of such oils, the fees to be charged and collected, preservation of records, remittances of fees, and penalties for violation of the

act. A clearer purpose to enact an inspection statute is not conceivable.

The Supreme Court of Washington held that these excessive fees were taxes. It held further that they were not direct taxes upon property. Had it been otherwise, that court itself would have been obliged to have declared them unconstitutional under the state law (Rec. p. 16). It then reached the conclusion that they were valid as a tax not upon property and stated

> "whether it is called an occupation tax, a tax upon the right to sell or an excise tax, is immaterial" (Rec. p. 17).

In sustaining the statute it concluded that this tax belonged to some one or other of those categories. The reasoning of the court of Washington had an initial false premise. It was not a tax which the legislature levied in the Oil Inspection Act. It was an excessive fee charged for the performance of a service required by it in an otherwise valid enactment. This can be easily demonstrated. If these excessive fees be a tax or an excise not on property but upon an occupation or a right to sell, upon what occupation or upon what right to sell is this tax or excise levied? Is it upon the general occupation of selling oil products? No,— for these fees are connected with the first sale or offer of sale of such products only, and not with the general business of selling such products. If it be such a tax or excise upon an occupation, that occupation is not the occupation of selling inspected oils. Is it a tax or excise upon the occupation of selling uninspected oils? No. For the sale of uninspected oils is prohibited by

the statute itself. Then upon what business or right to sell is this tax or excise levied? Can it be upon the business of having your oil products inspected? Certainly having such oil products inspected is not a business. It is not the business which the plaintiff is engaged in. Inspection of its oil products is a requirement of the State of Washington as a prerequisite to the engagement by this plaintiff in error in its business, namely the sale of its products imported from California for the purpose of sale in the State of Washington.

If this is a tax, then the payment of the tax should be a discharge of the obligation owed to the state and should invest the payer of the same with the right to sell or offer for sale his products subject to the tax. Such clearly is the effect of a property tax or a license tax or an occupation tax or excise, but it is not the case here. Plaintiff in error might tender the State of Washington all the fees demanded by the state under this statute, but it would not thereby be authorized to sell or offer its product for sale. There would still be left undischarged all the purposes of this statute and the police power of the state would not yet have come into exercise. Only by the inspection of such volatile products of oil and the fact, thus ascertained, that such products meet with the requirements of the statute itself, can the real purposes of the Oil Inspection Law of the State of Washington be satisfied. The payment of the fees is merely incidental to the discharge of those purposes.

We repeat, then, upon what business or right is this tax or excise laid? The answer is palpable. There is

no business and there is no right upon which there is any levy of a tax or excise. What the statute does is to charge a fee; an excessive and therefore unconstitutional fee for the performance of an inspection service required by it in an otherwise valid exercise of the police power of the state.

2. Conceding that the act may be read as levying an occupation tax or excise it is an unconstitutional burden on interstate commerce.

As we have just pointed out, the "tax" which the State Supreme Court deduces from this inspection act is in reality a payment exacted as a condition to the inspection of oil, which in turn is a condition to the right of selling it within the State of Washington. The payment of this "tax" then is the prerequisite of plaintiff in error's right to sell in Washington its products which it ships there from California. As a "tax," we submit, it is arbitrary, discriminatory and a burden on interstate commerce.

(a) In the aspect that the "tax" is levied only on the first or original sale of these products, the tax is a discriminatory burden on the importer and therefor on interstate commerce.

A state, we submit, cannot tax those who make an original sale of a commodity brought into the state, according to the quantity and quality of the article to be sold. The purpose of commerce is sale. The purpose of a manufacturer in shipping oil into the State of Washington is to sell it. His original sale is taxed. No subsequent sale of the same commodity is subject to

the tax, for, according to the statute, when oil has been once inspected and the inspection fee paid, it may move freely in the channels of commerce. It is therefore essentially a "tax"—if it is to be called a tax—on the importer.

The right of sale in interstate commerce.

That the right of sale is a necessary incident to the right to engage in interstate commerce has long been recognized by this court. That that right as such may not be taxed or burdened by the states is equally well established.

As early as *Gibbon v. Ogden*, 9 Wheat. 1, this court upheld the principle that the power of Congress over interstate commerce did not cease at the state line.

In *Brown v. Maryland*, 12 Wheat. 419 a license tax on importers of foreign articles was held unconstitutional. The argument that the privilege of bringing foreign articles into the country and of selling them after they are brought in are indissolubly connected, and that the right to sell is a necessary incident to the right of importing, was adopted by the court. Chief Justice Marshall said (pp. 438-439):

> "There is no difference, in effect, between a power to prohibit the sale of an article, and a power to prohibit its introduction into the country; the one would be a necessary consequence of the other. No goods would be imported, if none could be sold. * * * It is obvious, that the same power which imposes a light duty, can impose a very heavy one—one which amounts to a prohibition."

In the same case he said (p. 446):

> "Commerce is intercourse—one of its most ordinary ingredients is traffic. It is inconceivable, that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell."

An attempt to sustain a burden on interstate commerce as an occupation tax was made as in the case at bar by the Supreme Court of Missouri, but without success.

In *Welton v. Missouri*, 91 U. S. 275, a license tax on peddlers dealing in merchandise not the growth, produce or manufacture of the state, was upheld by the state court. But the argument of counsel in this court based on *Brown v. Maryland*, 12 Wheat. 419, that

> "a tax on the *occupation of an importer* is in like manner a tax on *importation*" (p. 279; italics ours),

was sustained by the court. The act was held to be discriminatory. This court, through Mr. Justice Field, said:

> "*The license charge exacted is sought to be maintained as a tax upon a calling. It was held to*

> *be such a tax by the Supreme Court of the State;* a calling, says the court, which is limited to the sale of merchandise not the growth or product of the state." (p. 278. Italics ours.)

He referred to *Brown v. Maryland,* where the same argument was made and where it was contended that the tax was not imposed on the importation of foreign goods, but upon the trade and occupation of selling such goods by wholesale after they were imported, and to the reply of the court in that case

> "that it was impossible to conceal the fact that this mode of taxation was only varying the form without varying the substance; that a tax on the occupation of an importer was a tax on importation." (p. 279.)

It was further said by Mr. Justice Field (p. 280):

> "Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities * * * between the citizens of different states.
>
> * * * * * * *
>
> "The main object of that commerce (that is, interstate commerce) is the *sale and exchange* of commodities." (p. 282.)

The tax was held to be discriminatory and void.

In *Walling v. Michigan,* 116 U. S. 446, a tax was imposed upon persons not residing or having their principal place of business within the state, who engaged in the sale of intoxicating liquors. The statute was held unconstitutional as in restraint of commerce by reason of its discriminatory character.

The statute was sought to be sustained on the ground urged by the state court that it did not prohibit

> "the introduction and sale of liquors made outside of the state. It simply taxes the person who carries on the business here by making sales in this state. It in no way interferes with the introduction of the liquors here. It tolerates and regulates, but seeks not to prohibit."

These views were rejected by this court, which said:

> "Another argument used by the Supreme Court of Michigan in favor of the validity of the tax is, that it is merely a tax on an occupation which, it is averred, the state has an undoubted right to impose." (Citing various cases.) (p. 460.)

But this court said:

> "None of these cases, however, sustain the doctrine that an occupation can be taxed if the tax is so specialized as to operate as a discriminative burden against the introduction and sale of the products of another state, or against the citizens of another state." (Ib.)

In *Schollenberger v. Pennsylvania*, 171 U. S. 1, this court examined the historical development of the principle that the right of sale is a necessary incident to the right of interstate commerce. Referring first to *Gibbons v. Ogden*, 9 Wheat. 1-193, the court commented on the statement of Mr. Chief Justice Marshall that the commerce clause extends to every species of commercial intercourse among the several states, and does not stop at the exterior boundary of a state. *Brown v. Maryland*, 12 Wheat. 419, was cited, the court referring to the statement in that case that the power to regulate commerce could not be stopped at the exterior boundary

of a state, but must enter its interior, and that if the power reached the interior of a state and might be there exercised, it must be capable of authorizing the sale of those articles which it permits to be introduced.

Next the court referred to *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U. S. 465, in which this court held that the power to regulate or forbid the sale of a commodity after it is brought into a state does not carry with it the right and power to prevent its introduction by transportation from another state.

The court then pointed out that *Leisy v. Hardin*, 135 U. S. 100, "went a step further." There it was held that an importer had the right to sell in a state that which he brought into it. The language of Mr. Chief Justice Fuller was quoted with approval:

> "They had the right to import this beer into that state, and in the view which we have expressed, they had the right to sell it, by which act alone it would become mingled in the common mass of property within the state. Up to that point of time, we hold that in the absence of congressional permission to do so, the state had no power to interfere, by seizure or any other action, in prohibition of importation and sale by the foreign or nonresident importer." (p. 22.)

And the court in the Schollenberger case said that:

> "In the absence of congressional legislation therefore, the right to import a lawful article of commerce from one state to another continues until a sale in the original package in which the article was introduced into the state." (p. 23.)

In conclusion the court pointed out the clear right of an importer to make a sale of his product, and the

limitations upon the power of the state in that respect. The court said:

> "We do not say or intimate that this right of sale extended *beyond the first sale* by the importer after its arrival within the state. *Waring v. The Mayor*, 8 Wall. 110, 122. The importer had the right to sell not only personally, but he had the right to employ an agent to sell for him. Otherwise his right to sell would be substantially valueless, for it cannot be supposed that he would be personally engaged in the sale of every original package sent to the different states of the Union. Having the right to sell through his agent, a sale thus effected is valid.
>
> The right of the importer to sell cannot depend upon whether the original package is suitable for retail trade or not. His right to sell is the same, whether to consumers or to wholesale dealers in the article, provided he sells them in original packages. This does not interfere with the acknowledged right of the state to use such means as may be necessary to prevent the introduction of an adulterated article, and for that purpose to inspect and test the article introduced, provided the state law does really inspect and does not substantially prohibit the introduction of the pure article and thereby interfere with interstate commerce." (p. 24.)

The principle thus announced in the Schollenberger case, and which, we submit, controls in the case at bar, in no way conflicts with the rule in such cases at *Emert v. Missouri*, 156 U. S. 296, *Woodruff v. Parham*, 8 Wall. 123, or *American Steel and Wire Co. v. Speed*, 192 U. S. 500. These cases merely hold that a uniform license tax operating alike on all merchants is not necessarily a burden on interstate commerce. The privilege of selling in a peculiar way, as by peddling, when taxed alike to all, is not discrimina-

tory or violative of the commerce clause when applied to imported goods. (*Emert v. Missouri*, 156 U. S. 296). It is when the tax is assessed, as in this case, only against the privilege of selling goods, the product of a foreign state, and only upon the original sales of such goods, that the tax becomes discriminatory and burdensome on interstate commerce.

The Supreme Court of Washington points out that:

> "The payment of the fee required by the oil inspection act is not an absolute and unavoidable demand but it is to be paid only upon the contingency that the oil is sold or offered for sale" (Rec. p. 17).

But if articles cannot be sold the business cannot be done. The argument is like that made in *Brown v. Maryland*, *Welton v. Missouri*, *Ex parte Schollenberger*, *Walling v. Michigan*, and other cases, where it was urged that the free movement of an article in interstate trade was not burdened because only its disposition in the state of its destination was taxed or restricted. This court rejected that position in every instance, and struck down statutes which in substance burdened commerce though apparently valid in form.

Mr. Justice Field pointed out that interstate commerce sales as such may not be taxed because:

> "The power of the state to exact a license tax of any amount being admitted, no authority would remain in the United States or in this court to control its action, however unreasonable or oppressive. Imposts operating as an absolute exclusion of the goods would be possible."
>
> *Welton v. Missouri*, 91 U. S. 275, 281.

And he showed that the commercial power of the federal government

> "continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the state, from any burdens imposed by reason of its foreign origin." (p. 282.)

No iron clad rule has been laid down by this court fixing the respective limits of state and federal authority over articles moving in interstate commerce. Indeed, this court has refused to lay down such rule (*Brown v. Maryland*, *Welton v. Missouri*). The original package doctrine is but one of many tests in regard to the power of a state to deal with articles imported from foreign countries or other states. An article may be in the original package and be subject to state taxation (*Brown v. Houston*, 114 U. S. 622). It may have left its original package and not be subject to state taxation (*Walling v. Michigan*, 116 U. S. 446). Thus, any tax upon the sale of an article by reason of its foreign growth or manufacture would be invalid although the sale were made in the broken package, for such a tax would be a discriminatory burden on interstate commerce. On the other hand, the sale of an article which has come to a point of rest within the state and which is there held for the convenience and business purposes of the importer, may be subject to the general taxing laws of the state regardless of the fact that the article has not left its original package.

The case at bar goes far beyond the cases which rest on an application of the original package doctrine. The com-

plaint is not merely that oils imported into the State of Washington cannot be sold in the original package without payment of the excessive fees in question, but that they may not be sold at all without such payment. It is not necessary that plaintiff in error should base its objection to the act on the discriminatory nature of the statute in taxing plaintiff in error on its own sales of its products in Washington. "Commerce among the states is not a technical legal conception but a practical one drawn from the course of business" (*Swift & Co. v. U. S.*, 196 U. S. 375, quoted in *Savage v. Jones*, 225 U. S. 501, 520). Taxation of *original* sales of oil brought into Washington burdens interstate commerce in such oil. Plaintiff in error is entitled to invoke the protection of the constitution, whether the tax falls on sales made by plaintiff in error, or by its customers importing such oils. The burden on interstate commerce is the same (*Savage v. Jones*, 225 U. S. 501, 520, 521).

(b) Viewed as an occupation tax, the tax is void because directed only against sales of products of other States.

It may be suggested in this case that the tax here levied is not discriminatory because it is levied upon all persons making an original sale of petroleum or its products in the State of Washington. But as all oil which is sold in the State of Washington is imported from beyond its borders, the burden of the "tax" would fall on interstate commerce, and it would be no answer to say that it falls alike on all engaged in that commerce.

> "A burden imposed by a state on interstate commerce, is not to be sustained simply because the statute imposing it applies alike to all the people of all the states, including the people of the state enacting such statute."
>
> *Minnesota v. Barber*, 136 U. S. 289, 327.

Neither is a tax rendered valid by the fact that it applies to internal as well as external commerce.

> *Crew Levick & Co. v. Pennsylvania*, 245 U. S. 292;
>
> *Minnesota v. Barber*, 136 U. S. 313;
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> *Brennan v. Titusville*, 153 U. S. 289;
>
> *Brimmer v. Rebman*, 138 U. S. 78;
>
> *Robbins v. Shelby Taxing District*, 120 U. S. 489, 497;
>
> Case of the *State Freight Tax*, 15 Wall. 232-277.

A tax levied against the products of other states as such is unconstitutional because it is a discriminatory burden on interstate commerce.

In the appendix we annex pages 684 and 685 of United States Geographical Bulletin II—33, entitled "Petroleum in 1916," by James D. Northrup, published April 26, 1918, being Part II of the Report on Mineral Resources of the United States, showing that no oil has been produced in the State of Washington from the year 1859 to the year 1916. Furthermore, this court will take judicial notice of the fact that oil and its manufactures do not constitute one of the industries of

the State of Washington, and that no oil is produced in the State of Washington.

Sligh v. Kirkwood, 237 U. S. 52, 61;

McLean v. Denver & Rio Grande Ry., 203 U. S. 38;

Michigan Central Railroad v. Powers, 201 U. S. 245 at p. 300.

Discriminatory taxes against articles from other states are void.

> "It matters not whether the tax be levied directly upon the articles sold or in the form of license after they are sold."
>
> *Webber v. Virginia*, 103 U. S. 344.

In view of the fact that neither crude petroleum nor its manufactures are produced in the State of Washington, the language of Judge Seymour, in *American Fertilizing Co. v. Board of Agriculture*, 43 Fed. 609, is apposite. He said:

> "Passing, however, from this view, drawn from the express words of the constitution, and returning to Judge Marshall's celebrated argument that the power to tax necessarily includes the power to destroy, and is therefore inconsistent with the power of the United States to preserve commerce between the states, it may be remarked that, if the power were given to a state to tax all imports from other states without control, provided equal taxation were laid upon the same articles if produced or made in the state, the states would practically have the power to prohibit the introduction of any article not made in the state. North Carolina might tax the importation of manufactured cloths, and Massachusetts that of cotton or tobacco. If this tax can be sustained, it is certain that a license tax in these words would be constitutional:

> 'No manufactured cotton shall be sold or offered for sale in this state until the manufacturer or person importing the same shall first obtain a license therefor,' etc., 'and pay a tax of five hundred dollars.' A similar tax upon the different brands of tobacco might be levied in any state that does not manufacture tobacco. But it is needless to multiply illustrations which everyone can supply for himself. It must be evident that a requirement of equality of taxation on the imported and home article would be no protection against such taxation as would seriously check, if it did not destroy, commerce between the states, and would impair, to the point almost of rendering its benefits nugatory, the domestic good results of the union of the states." (p. 613.)

Applied to the taxation of commerce in an article wholly the product of foreign or extraterritorial manufacture, we submit, the reasoning is unanswerable.

It should be noted that as a statute taxing first sales of oil in Washington, this act stands alone. There is nothing in the laws of Washington similarly taxing first sales of other products.

This court said, in *Brimmer v. Rebman*, 138 U. S. 78, that a state

> "may not under the guise of exercising its police powers, or of enacting inspection laws, make discriminations against the products and industries of some of the states in favor of the products and industries of its own or of other states." (p. 82.)

And what cannot be done indirectly, we assume, cannot be done directly.

In the same case the court said:

> "Any local regulation which, in terms or by its necessary operation, denies this equality in the

> markets of a state is, when applied to the people and products or industries of other states, a direct burden upon commerce among the states, and therefore, void. Welton v. Missouri, 91 U. S. 275; Railroad Co. v. Husen, 95 U. S. 465; Minnesota v. Barber, 136 U. S. 313." (Ib.)

An ordinance requiring vessels laden with the products of other states to pay license fees for the use of public wharves, which fees are not exacted from vessels landing with products of the taxing state, is void.

Guy v. Baltimore, 100 U. S. 434.

Even the police power of the state has been held inadequate to exclude from the limits of the state articles recognized as lawful objects of interstate commerce. Thus prior to the enactment of the Wilson Act, the power of the states to exclude liquor from their territory was denied by this court, whether that power was attempted to be exercised by legislation directed against the entry of such articles into the state or by tax attempted to be levied on their sale after originating within the state.

As stated by Mr. Chief Justice Fuller, this court in *Leisy v. Hardin*, 135 U. S. 100, held that the power could not be conceded to the states

> "to exclude, directly or indirectly, the subjects of interstate commerce, or, by the imposition of burdens thereon, to regulate such commerce without Congressional permission. The same rule that applies to the sugar of Louisiana, the cotton of South Carolina, the wines of California, the hops of Washington, the tobacco of Maryland and Connecticut, or the products, natural or manufactured, of any state,

applies to all commodities in which a right of traffic exists, recognized by the laws of Congress, the decisions of courts and the usages of the commercial world."

Lyng v. Michigan, 135 U. S. 161, 166.

(c) The fees here involved, when considered as a tax, are precisely like a gross receipts tax on interstate commerce, and therefore invalid.

State taxation burdens interstate commerce directly when it measures the tax by the volume of interstate business, or by the gross returns therefrom. Thus state income taxes on corporations doing an interstate business are invalid when measured by gross receipts—but valid when based on the net income.

The distinction between taxes as direct or indirect burdens on interstate commerce is nowhere better shown than in the recent decision of the court in *United States Glue Co. v. Oak Creek*, decided June 3, 1918, U. S. Sup. Court, 15 Adv. Op. 636, 38 Sup. Ct. Rep. 499. That opinion sustained the validity of the Wisconsin Income Tax Law. Mr. Justice Pitney showed that "the intent and necessary effect of the act is to tax not gross receipts but net income". Proper provision having been made for ascertaining the proportion of the intrastate business reflected in the net income of foreign corporations doing business in Wisconsin, the act was held not obnoxious to the interstate commerce clause of the Constitution.

> "It is settled," said Mr. Justice Pitney, "that a state may not directly burden interstate commerce, either by taxation or otherwise. But a tax that only indirectly affects the profits or returns from such commerce is not within the rule."

He cited *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688, where it was held that the right of a foreign corporation to engage in business may be taxed according to the value of its property in the State,

> "if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes".

Mr. Justice Pitney pointed out that the correct line of distinction was illustrated in two recent decisions of this court: in *Crew Levick C. v. Pennsylvania*, 245 U. S. 292, where it was shown

> "that a state tax upon the business of selling goods in interstate commerce measured by a percentage of the gross transactions in such commerce was necessarily a tax on such commerce, *since it operated to lay a direct burden upon every transaction by withholding for the use of the state a part of every dollar received*" (italics ours);

and in *Peck v. Lowe*, decided May 20, 1918, U. S. Sup. Court, 15 Adv. Op. 528, 38 Sup. Ct. Rep. 432, where the court held that a *net* income tax was not a direct burden on the business from which that net income was derived. Mr. Justice Pitney proceeded to say:

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude, and irrespective of whether it is profitable or otherwise. Conceivably it may be suf-

> ficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the states are not exempted by the Federal Constitution because they happen to be engaged in commerce among the states."
>
> *U. S. Glue Co. v. Oak Creek*, supra.

A tax on all original sales of oil brought into the State of Washington measured by the number of gallons involved in each sale is in reality a gross receipts tax. Concede the power of the State to levy such a tax and it could readily be levied in a sufficient amount to prohibit sales at all. Such a tax differs from the ordinary occupation tax or fixed license charge for doing business as clearly as a gross receipts tax differs from a tax on net income. Such a tax as the latter is only

> "one of the ordinary and general burdens of government". (Ib.)

But this "tax" falls on each barrel of oil imported by this plaintiff from California prior to its sale or its offer for sale. It is not a tax that only indirectly affects the profits or returns from interstate transactions. It is not like the franchise tax held good in the leading case of *Postal Telegraph Company v. Adams*, 155 U. S. 688. Nor is it like the universal merchants privilege tax or merchants capital tax sustained in *American Steel & Wire Co. v. Speed*, 192 U. S. 500 (both such taxes being only indirectly burdensome upon commerce), or the ad valorem property tax involved in *Bacon v. Illinois*, 227 U. S. 504. Nor is it the case of a net income tax such as was sustained in *U. S. Glue Co. v. Oak Creek*, supra, and *Peck v. Lowe*, supra. Nor is it the case of a license upon the seller of goods so imported, some of which license taxes are valid and some are not, depending upon whether or not they fall within the rule of *Brown v. Maryland*, 12 Wheat. 419, *Robbins v. Shelby County Taxing District*, 120 U. S. 489 and similar cases.

It is the case of a direct tax, if a tax at all, upon the sale of each and every gallon of such goods so imported from California, and by the importer sold or offered for sale in Washington.

The tax is in its essence identical with the taxation of gross receipts from the sale of the article itself. As in the case of a gross receipts tax, the fees here have no regard to the value of the article, nor to the net returns from the sale of the article, nor to the value of the franchise or privilege of selling such article. We submit the tax cannot be distinguished from taxation of

gross receipts in interstate commerce, and that it is, therefore, unconstitutional.

Crew Levick Co. v. Pennsylvania, 245 U. S. 292;
Philadelphia Steamship Co. v. Pennsylvania, 122 U. S. 326 (overruling *State Freight Case*, 15 Wall. 292);
United States Glue Co. v. Oak Creek, supra.

(d) As a tax, these fees cannot be supported by the taxing power of the state over property within its limits.

The act according to the State Supreme Court, is not a property tax, and as such would be unconstitutional under the state constitution (Rec. p. 16). It may be conceded at once that under the federal constitution oil and its products, though shipped into the state from other states, would be subject to taxation, if the oil had become mingled with the other property of the state. This might be true although the oil might be the subject of interstate commercial transactions. But the Supreme Court of Washington expressly found that in that aspect of the case the "tax" was not sustainable under the state constitution. On the other hand, the two cases most relied upon by the Supreme Court of Washington, namely *General Oil Company v. Crain*, 209 U. S. 211, and *Bacon v. Illinois*, 227 U. S. 504, were both cases in which state statutes were sustained as properly taxing property in the state.

The state court commented with surprise on the fact that the case of *General Oil Company v. Crain* had not been cited in the case of *Foote v. Maryland*, 232 U. S.

494, and concluded that it was not intended in the latter decision to overrule *General Oil Company v. Crain* (Rec. p. 15). It is not surprising that this court found it unnecessary to overrule, distinguish or even cite the Crain case in its decision in the Foote case. The former decision was an application of the principle that property which is in a state for the convenience of its owner and which is receiving the protection of its laws, is subject to state taxation; the Foote case decided that excessive inspection fees cannot be levied as a condition to engaging in interstate commerce.

The inspection act in the Crain case was dealt with as a taxing statute, and the point whether it *could* be so treated not discussed. The question in the Crain case was whether or not the oil there involved was moving in interstate commerce at the time the fees or taxes in question were assessed against it, and therefore subject to taxation. On the authority of *American Steel & Wire Co. v. Speed*, 192 U. S. 500, it was concluded that when the oil reached Memphis, and was there stored, it became a part of the general mass of property of the state.

Basing their conclusion on the principles of *Pittsburg & Southern Coal Co. v. Bates*, 156 U. S. 577, *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, and *Kelley v. Rhoads*, 188 U. S. 1, six of the judges of this court, speaking through Mr. Justice McKenna, held that the oil had come to a point of rest and was taxable. Its transit was interrupted. As was pointed out, the property of the company

> "was receiving the protection of the state. Its oil was not in movement through the state. It had

> reached the destination of its first shipment, and it was held there, not in necessary delay or accommodation to the means of transportation, * * * but for the business purposes and profit of the company." (p. 230.)

Mr. Justice McKenna observed that the case had been considered in view of the cases which involved the power of taxation; that the oil was not property in interstate commerce, and was, therefore, subject to state taxation.

The Crain case illustrates no issue here, because the statute in that case was sustained as a property tax. As the fees in the case at bar could not be upheld as a property tax, the Supreme Court of Washington sought to sustain them as an occupation tax. Conceding, therefore, that, under the authority of the Crain case, the federal constitution would not be violated by a statute taxing plaintiff's oil after it had arrived in the State of Washington, that question is not before the court. The Supreme Court of Washington itself held that the ruling of the Crain case cannot be applied in the case at bar without rendering the statute void under the state constitution. On the other hand, the Crain case does not purport to decide that a state may tax the completion as such of an interstate commerce transaction. It does not decide that the right to originally sell a commodity, which has been brought into a state from a sister state, may be the special subject of state taxation. Such a ruling would be contrary to numerous decisions by this court.

Leisy v. Hardin, 135 U. S. 100;

Walling v. Michigan, supra;

Welton v. Missouri, supra;
Brown v. Maryland, supra;
Schollenberger v. Pennsylvania, supra.

Similarly the case at bar is not affected by the decision in *American Steel & Wire Co. v. Speed*, 192 U. S. 500, cited by the Washington state court. There a merchant's privilege tax levied on all merchants in Tennessee was sustained as against dealers in articles brought into the State of Tennessee and there sold and distributed. It was contended that the tax in question was invalid because the goods which were the subject of sale were in the original package at the time the tax was assessed. *Brown v. Maryland* was relied upon.

The opinion by the present chief justice of this court pointed out that the absolute prohibition upon the states against the taxation of imports from foreign countries is not to be confounded with the prohibition against interference with the exclusive power of Congress to regulate commerce. It was shown that goods which had arrived from other states, and which were at rest in the state enjoying the protection which the laws of the state afforded, could be taxed without discrimination like all other property.

The difference between the power of the state to tax goods (prohibited only in the case where the goods are imports from a foreign country and still retain their character as such) and the *authority of the state to interfere with the introduction and disposal of goods in interstate commerce*, was clearly drawn, and as Mr. Justice White showed, while the decisions in *Brown v.*

Maryland and in the cases following it, as well as the decisions in *Leisy v. Hardin*, and the cases of which it is typical, all held that

> "interstate commerce was completely terminated only after the sale at the point of destination in the original package." (p. 522.)

Each case turned

> "upon the nature and operation of the particular exertion of state authority considered in the respective cases." (ib.)

The analysis of the law in *American Steel & Wire Co. v. Speed* definitely establishes the principle that the right of the state to tax goods which are the subject of interstate commerce, does not depend upon the question whether interstate commerce in the articles involved has completely terminated; that, therefore, the state may legitimately exercise its taxing power with respect to goods which are still the subject of interstate commerce; but that at the same time the state is *devoid of power to impose prohibitory or discriminatory conditions upon the disposition of those same goods or to restrict in any manner the completion of commercial intercourse in them.* This, as we understand it, is the clear ruling of the American Steel & Wire Co. case.

The doctrine of *American Steel & Wire Co. v. Speed* was affirmed in *Bacon v. Illinois*, 227 U. S. 504. This case, quoted at length and much relied upon by the Supreme Court of Washington, sustained a tax on grain in plaintiff's elevator, on the ground that the grain had a situs in the state. In that case, just as in the Crain case, the tax was sustained because the grain was

found not to be in transit. As was pointed out by this court:

> "The property was held by the plaintiff in error in Chicago for his own purposes and with full power of disposition. It was not being actually transported and it was not held by carriers for transportation. * * * He had established a local facility in Chicago for his own benefit and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the state in an assessment for taxation which was made in the usual way without discrimination." (p. 516.)

Referring to *American Steel & Wire Co. v. Speed*, *Woodruff v. Parham*, *Brown v. Houston*, *Pittsburg & Southern Coal Co. v. Bates* and *General Oil Company v. Crain*, the court concluded, on the authority of these cases, that the property in question was taxable, because it found that

> "In the present case the property was held within the state for purposes deemed by the owner to be beneficial; it was not in actual transportation; and there was nothing inconsistent with the federal authority in compelling the plaintiff in error to bear with respect to it, in common with other property in the state, his share of the expenses of the local government." (p. 517.)

This decision so largely relied upon by the Supreme Court of Washington throws no light, we submit, and has no bearing, upon the issue here presented.

Conceding that the oil here in question might be the subject of a property tax, or that the right to sell oil in the State of Washington might be the legitimate purpose of a general or license tax, the fact remains that

the so-called "tax" in this case is directed only against the original or first sale of the particular article, the product of a foreign state, and thus a tax directly on the importer as such.

The distinction between the reasoning of *Bacon v. Illinois* (and of the cases referred to in the decision in that case) and the reasoning which would seek to sustain a tax on the very act of engaging in interstate commerce must be apparent. If the shipment of oil into Washington and its sale in Washington constitute interstate commerce, and if both the shipment and the sale are integral essential acts of interstate commerce, then clearly this statute which taxes the second of those acts, the sale in consummation of an interstate commerce transaction, is an improper burden on interstate commerce.

This court has said that property may not be taxed while in transit between states, because such a tax, if imposed by each state through which an article might move, could quickly annihilate interstate commerce. Transit and transportation are essential to interstate commerce. Equally essential is the right of disposition of an article shipped into a state in interstate commerce. Interstate commerce would be impossible without both or either.

To tax the right of sale therefore is to tax one of the functioning attributes of interstate commerce without which the commercial purpose of interstate shipment could not be consummated; and the power to tax the sale of an article in consummation of its interstate commerce shipment is very different from the power

to tax that article, together with other property in the state. To be sustainable either tax must in any event be levied without any discrimination based on the foreign character of the product or its sale.

Indeed it seems that no acts necessary to the completion of interstate commerce in an article can be taxed as such.

Thus this court at its last term held that the erection of an ice plant in a foreign state and testing it for three weeks was inherently a part of its sale and hence interstate commerce which could not be taxed.

> *York Mfg. Co. v. Colley*, decided May 20, 1918, U. S. Sup. Court, Adv. Op. 598, 599; 38 Sup. Ct. Rep. 430.

The gist of the argument of the state court as we have seen is that these goods having come to a state of rest, and therefore being subject to state taxation, were not the object of interstate commerce; that therefore the imposition of the fees was not an unreasonable burden upon interstate commerce.

But, as has also been noted, it has been recognized ever since *Brown v. Maryland* that the right to sell an imported article is a component part of the right to engage in foreign or interstate commerce, a right which the states could not burden.

It was not a recession from this view of the true limit and extent of the power to regulate commerce among the states that the doctrine became fully established that a state could tax an article imported from another state or its sale when it could not prohibit such

importation (*Woodruff v. Parham*, 8 Wall. 123; *Brown v. Houston*, 114 U. S. 622), *provided no discrimination attended the exercise of the taxing power.* This was clearly pointed out by this court in *American Steel & Wire Co. v. Speed*, 192 U. S. 500, at page 522, where it was held that the taxation question and the prohibition on sales question were determined with the fact clearly in mind that interstate commerce is affected in each case, but that each case turns on the nature and operation of the authority exercised.

In the taxation cases

> "the court, therefore, conceded that the goods which were taxed had not completely lost their character as interstate commerce, since they had not been sold in the original package. As, however, they had arrived at their destination, were at rest in the state, were enjoying the protection which the laws of the state offered, and were taxed without discrimination like all other property, it was held that the tax did not amount to a regulation in the sense of the constitution."
>
> *American Steel & Wire Co. v. Speed*, supra.

See also

General Oil Co. v. Crain, supra;

Bacon v. Illinois, supra.

We respectfully submit that it was error for the Supreme Court of Washington to conclude, because this court had held, in certain cases, that where an article of interstate commerce had reached a point of rest it was subject to local taxation, that therefore the present statute did not affect interstate commerce on the ground

that the act only operates on goods after they have reached a point of rest. This statute undertakes to say what shall be done with certain articles produced in and imported from another state before such articles can be sold or offered for sale in the state of Washington. The sale of the goods being the sole object of importation, being "an essential ingredient of the commerce itself," the action of the State of Washington in prescribing to this plaintiff in error the terms and conditions under which those articles could be sold, was a regulation directly and powerfully affecting interstate commerce.

It is apparent that if the terms and conditions of the statute were sufficiently severe, the entire commerce in these articles would be stopped.

By way of final illustration of the principle that inspection laws must be so designed as not to unreasonably nor arbitrarily hamper interstate commerce by interfering with the sale of articles imported from other states, we call the court's attention to *Minnesota v. Barber*, 136 U. S. 313, and *Brimmer v. Rebman*, 138 U. S. 78. Under the statutes involved in those cases the meats which were prohibited from sale were objects of interstate commerce, and the fact that these statutes made the sale of such meats unlawful and therefore affected interstate commerce in those articles, coupled with the other fact that as police measures those inspection acts were unreasonable and discriminatory, rendered them obnoxious to the commerce clause of the federal constitution. In the latter of the two cases the discrimination turned in part upon the fees charged. The soundness of the doctrine of those two cases has

never been questioned. Yet if the reasoning of the court of Washington in the instant case is sound, those cases are wrong on principle, for the inspection acts involved did not prohibit the importation of such meats in express terms, but only the sale of such articles. Such meats having come to a state of rest, they were by that reasoning no longer the objects of interstate commerce. The truth, of course, is that any state law which prohibits or tends to prohibit interstate commerce, whether by prescribing the terms upon which goods moving in interstate commerce shall be sold, or in any other manner, is void as laying a burden upon such commerce unless it comes within some one of two great powers of sovereignty possessed by a state, namely, the power of taxation and the police power. And in either of these cases such burden is still unconstitutional unless the power be exercised reasonably, necessarily, without discrimination and not as a cloak for a disguised prohibition or excessive fee. These propositions have nothing to do with any "coming to rest" or "original package" doctrine.

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3. The "tax" violates the fourteenth amendment to the constitution.

Viewed as a tax the fees provided for by the inspection law are levied arbitrarily and without regard to any real basis for classification. Oil once inspected may be sold without payment of further fees. The so-called occupation tax is assessed only on the occupation of having oil inspected for the purpose of making the or-

iginal sale thereof in Washington. It cannot be viewed as a tax solely upon the wholesale dealers in such products and not upon retail dealers. If the plaintiff in error sells its products as a retail dealer, that is, in small quantities directly to the consumers, it must nevertheless pay these fees. We have searched the books to find a case of a "tax" as arbitrary as this, namely, one upon the original vendors, and we can find none. There is no basis for such a "tax" resting in any sound distinction and the fees, if they be regarded as a "tax," are in violation of the fourteenth amendment to the Constitution, in that, being arbitrarily assessed against the plaintiff, plaintiff is denied the equal protection of the law.

Southern Railway Co. v. Greene, 216 U. S. 400, and cases there cited.

This is true without regard to the fact, which we have already shown, that such fees viewed as a tax are a direct burden upon the sale of imported articles brought into the state from sister states. When the court finds, as is the case here, that in truth and fact as a "tax" these fees are leviable only against those engaged in interstate commerce, and thus in practice constitute a tax only upon such persons, the arbitrary character of the fees must render them especially obnoxious, not alone to the commerce clause, but also to the due process and equal protection of the law clauses of the fourteenth amendment.

Southern Railway Co. v. Greene, supra.

Raymond v. Chicago Traction Co., 207 U. S. 20.

Connolly v. Union Sewer Pipe Co., 184 U. S. 540.

If upon the payment of these fees the plaintiff were permitted to sell its products and it were thus the vendor of uninspected products of petroleum, something of a real basis of classification might be found, in that it was the vendor of uninspected products while other merchants who might sell or offer such products for sale were the vendors of inspected products. But this is not the case. The plaintiff upon the payment of these fees is not permitted to sell its products until they are inspected. It is not allowed to sell uninspected products. Every vendor of volatile products of petroleum in Washington is a vendor of similar—that is, inspected products, and only the *first vendors* of such products are taxed for selling them. There is thus no real basis for classification, and the tax, if so we call it, is clearly arbitrary.

Arbitrary selection cannot be justified even if the legislature attempts to call it a basis of classification.

Southern Railway Co. v. Greene, supra;
Gulf, Colo. Santa Fe Ry. v. Ellis, 165 U. S. 150;
Cotting v. Kansas City Stock Yds., 183 U. S. 79;
Connolly v. Union Sewer Pipe Co., 184 U. S. 540.

This court is not bound, nor can it permit itself to accept the construction placed upon the statute by the state court when that construction impairs rights guaranteed the plaintiff in error under the federal constitution. This is equally true of the provisions of the fourteenth amendment, which we have pleaded, and of the provisions of the commerce clause of the constitution.

Galveston H. & S. Co. v. Texas, 210 U. S. 217, 227;
St. Louis So. R. Co. v. Arkansas, 235 U. S. 350;

Kansas City v. Botkin, 240 U. S. 227;

Crew Levick Co. v. Pennsylvania, supra.

It was said by the court in *St. Louis So. R. Co. v. Arkansas*, supra (235 U. S. 350, 362):

> "When the question is whether a tax imposed by a state deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the State Court."

In *Kansas City v. Botkin*, supra (240 U. S. 227), the court said:

> "Our decision must regard the substance of the exaction, its operation and effect as enforced, and cannot depend upon the manner in which the taxing scheme has been characterized."

SUMMARY.

It is, therefore, respectfully submitted that the judgment of the Supreme Court of Washington should be reversed, and the demurrer to the amended complaint overruled, because:

1. The inspection fees levied are admitted by the demurrer to be excessive, and the act is, therefore, unconstitutional in so far as the fees are assessed for the inspection of oil brought into the State of Washington from other states.

Foote v. Maryland, 232 U. S. 494.

2. The statute cannot be sustained as a taxing statute, because:

First: The Supreme Court of Washington decided that it was not sustainable under the state constitution

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as a tax on property in Washington. The court endeavored to sustain it as an occupation or excise tax. Such an interpretation is clearly contrary to the intent, purpose and operation of the statute. The act will not be so construed.

Galveston, etc. Ry. v. Texas, 210 U. S. 217;
Postal Telegraph Co. v. Taylor, 192 U. S. 64.

Second: As an occupation tax it is an unconstitutional burden on interstate commerce:

(a) Because it taxes only the first or original sale of oil brought into Washington, and, therefore, discriminates against the importer.

Brown v. Maryland, 12 Wheat. 419;
Welton v. Missouri, 91 U. S. 275;
Walling v. Michigan, 116 U. S. 446;
Schollenberger v. Pennsylvania, 171 U. S. 1.

(b) Because as an occupation tax it is directed only against the original sales of articles not produced in Washington.

Brimmer v. Rebman, 138 U. S. 78;
Leisy v. Hardin, 135 U. S. 100.

(c) Because, viewed as an occupation tax, it is a tax on interstate commerce business and similar to a gross receipts tax on interstate commerce.

Crew Levick Co. v. Pennsylvania, 245 U. S. 292;
United States Glue Co. v. Oak Creek, U. S. Sup. Court, Oct. Term, 1917, decided June 3, 1918; 38 Sup. Ct. Rep. 499.

Third: As an occupation tax the tax is not sustainable under the taxing power of the state over property within its limits.

Minnesota v. Barber, 136 U. S. 313;
Brimmer v. Rebman, 138 U. S. 78;
American Steel & Wire Co. v. Speed, 192 U. S. 500.

The doctrine of *General Oil Co. v. Crain*, 209 U. S. 211, and *Bacon v. Illinois*, 227 U. S. 504, with regard to the taxation of property within the jurisdiction of the state is not applicable.

3. Viewed as an occupation tax the assessment of the fees violates the fourteenth amendment to the constitution, since it arbitrarily, and without regard to any real basis for classification, taxes only those who seek to make an original sale of certain specified articles brought into the State of Washington without taxing subsequent vendors of the same articles.

Southern Railway Co. v. Greene, 216 U. S. 400;
Gulf, Colorado, Santa Fe Ry. v. Ellis, 165 U. S. 150.

Respectfully submitted,

E. S. Pillsbury,
F. D. Madison,
H. D. Pillsbury,
Alfred Sutro,
Oscar Sutro,
R. A. Ballinger,
Alfred Battle,
Bruce C. Shorts,
Attorneys for Plaintiff in Error.

(APPENDIX FOLLOWS.)

APPENDIX.

"A"

(Being a copy of the Washington State Oil Inspection Law as published by the State.)

STATE OF WASHINGTON

STATE OIL INSPECTION LAW

PASSED BY THE

LEGISLATURE OF 1907

PUBLISHED BY THE

STATE OIL INSPECTOR

C. W. Gorham, Public Printer, Olympia

State Oil Inspection Law of the State of Washington.

Chapter 192, Laws of 1907

[H B, 345.]

An Act creating the office of State Oil Inspector, defining his powers and duties, providing for the inspection of illuminating oils, gasoline, benzine, distillate and volatile products of petroleum, providing a penalty for the violation thereof, and repealing chapter 161 of the Session Laws of 1905, entitled: "An Act creating the office of State Oil Inspector providing for his compensation, and providing for the inspection of petroleum and its products for illuminating purposes, and providing a penalty for the violation thereof."

Be it enacted by the Legislature of the State of Washington:

Appointment—Bond—Salary.

Section 1. The Governor shall appoint by and with the consent of the Senate, a qualified elector of this State who shall not be interested in the manufacture or sale of any illuminating oils, gasoline, benzine, distillate, or any volatile product of petroleum, to be known as State Oil Inspector, who shall hold office for four years from the date of appointment or until his successor is appointed and has qualified. Such person, so appointed, shall, before he enters upon the discharge of his duties, take an oath or affirmation of office as prescribed by the Constitution of this State, and shall execute a bond in the sum of Five Thousand ($5,000) Dollars to the

State of Washington, conditioned for the faithful performance of the duties of his office, to be approved by the Governor, which bond and oath of office shall be filed in the office of the Secretary of State. Such bond shall be for the use of all persons injured by the act or neglect of said Oil Inspector or his deputies. The State Oil Inspector shall receive a salary of Two Thousand ($2,000) Dollars per annum, and necessary office and traveling expenses, to be paid monthly out of the general fund, upon vouchers to be audited by the State Auditor.

Deputy Inspector—Bond—Salary.

The State Oil Inspector shall appoint, by and with the consent of the Governor, a deputy State Oil Inspector who shall receive a salary of one hundred and twenty-five ($125) dollars per month, and necessary traveling expenses, to be paid in the same manner as the expenses and salary of State Oil Inspector.

He may also appoint such additional deputies as may be necessary, who shall receive one hundred dollars per month while in the actual service of the State, and necessary expenses to be paid in the same manner as the State Oil Inspector.

The Deputy State Oil Inspector shall, before he enters upon the duties of his office, take and subscribe an oath of office and shall execute a bond in the sum of Two Thousand ($2,000) Dollars, to be approved by the State Oil Inspector, which bond and oath of office, together with the certificate of appointment, shall be filed in the office of the Secretary of State.

Testing Apparatus—Right to Enter Premises.

SEC. 2. The State Oil Inspector shall obtain the necessary instruments and apparatus for testing the quality of such illuminating oils, gasoline, benzine, distillate or volatile product of petroleum, and it shall be the duty of said State Oil Inspector, or his deputies, to examine and test the quality of all illuminating oils, gasoline, benzine, distillate or volatile product of petroleum intended for sale for consumption within this State for illuminating, manufacturing, domestic or power purposes, and in the discharge of such duty it shall be lawful for said State Oil Inspector and his deputies, and they shall have the right to enter into or upon the premises of any manufacturer, vendor or dealer in any such oil, gasoline, benzine, distillate or other petroleum product for the inspection of the same as provided in this act.

All Petroleum Products to be Inspected.

SEC. 3. All gasoline, benzine, distillate or other volatile product of petroleum intended for use or consumption in this State for illuminating, manufacturing, domestic or power purposes, before being sold or offered for sale by any firm, corporation, manufacturer, dealer, vendor, or other person, shall first be inspected and tested for its specific gravity, and, after having been so inspected and tested, the State Oil Inspector, or his deputies, shall issue a certificate of inspection thereof and shall cause every package, barrel, cask or other receptacle thereof to be labeled or branded with its exact specific gravity over his official signature.

Approved Oils to be Branded.

It shall also be the duty of said State Oil Inspector, or his deputies, to examine and test the quality of all illuminating oils offered for sale for consumption within this State, and to reject for illuminating purposes all oils which will take fire and burn at a temperature less than 120 degrees Fahr. thermometer. The quantity of oil used in making such test shall not be less than one-half pint, and the oil tester adopted and used shall be the open-cup Taglibue electric spark, or one similar in construction and result. If the oil so inspected shall meet such requirement he shall brand or label each and every package, barrel, cask or other receptacle containing the same with the word "approved", and date of such inspection, over his official signature. Should oil so tested or examined be contained in tank cars, upon finding the oil so contained to meet the requirements hereinbefore specified, he shall furnish the owner or person in charge of such oil with a certificate stating the number and letters or other marks of designation of the tank cars inspected, the number of gallons of oil of the tank car inspected, the number of gallons of oil contained in it, the date of inspection, the name of the owner, the city or town in which such tank was inspected, the temperature at which such oil took fire and burned and that such oil is approved. Upon each barrel, cask or other receptacle, drawn from such tank car and offered for sale, shall be fixed the same brand or device as is required for oil inspected in barrels or casks.

Rejected Oils to be Branded.

If the oil or other petroleum product as tested shall not meet said requirements the State Oil Inspector, or his deputies, shall mark in plain letters on the package, barrel or cask, the word "rejected" over his official signature, and if any oil or other petroleum product contained in tank car shall fail to meet said requirements it shall be rejected by the State Oil Inspector or his deputy, and a written notice, stating the number and letters or other marks of designation of the tank car so rejected, the date and place of inspection, and that the oil or other petroleum product has been rejected, which notice, signed by the State Oil Inspector, or his deputy shall be placed in the hands of the person owning or in charge of such oil or other petroleum product.

All illuminating oils, gasoline, benzine, distillate or any volatile product of petroleum, manufactured or refined in this State shall be inspected before being removed from the manufactory or refinery.

State Chemist to Examine Oils.

Whenever complaint is made to the Oil Inspector in regard to the illuminating qualities of illuminating oil that may have been so inspected, it shall be his duty to secure a sample of such oils complained of which shall be turned over to the chemist of the State University who shall thoroughly analyze and test said oils for their illuminating qualities. If upon such analysis and test the chemist of the State University shall decide that although the oil be of the required test it is of inferior

illuminating quality then the Oil Inspector, upon receipt of the chemist's report, shall brand such oil: "State of Washington. Rejected. Quality inferior," with the date of inspection over his official signature. Such report of the State Chemist shall be *prima facie* evidence of the character and quality of the oil or other petroleum product so analyzed and tested.

Fees to be Charged by Inspector.

SEC. 4. The State Oil Inspector, or his deputies, shall charge and collect a fee of forty (40c) cents per barrel for the first two (2) barrels; thirty (30c) cents per barrel for the next three (3) barrels; twenty (20c) cents per barrel for the next five (5) barrels; and fifteen (15c) cents per barrel for the next fifteen (15) barrels of not less than fifty (50) gallons each, and one-fifth of one cent for each and every gallon thereafter inspected at any one time of any oil, gasoline, benzine, distillate or volatile petroleum product so inspected: *Provided*, That where the same is offered for inspection in carload lots or over, then the fee shall be one-fifth of one cent for each and every gallon contained in such carload lot or over so inspected. Such inspection fee shall be paid by the owner, agent or other person in charge or possession of such oil at the time of the inspection thereof, and shall be a lien upon the oil, gasoline, benzine, distillate or other petroleum product so inspected, to be immediately collected and enforced by said State Oil Inspector.

Records of All Inspections to be Kept.

SEC. 5. It shall be the duty of the State Oil Inspector or his deputies, to keep true and accurate records of all

oils, gasoline, benzine, distillate or other petroleum product inspected and branded by them, which record shall state the date of inspection, the number of gallons rejected, the number of gallons approved, the number of gallons inspected, the number and kind of tanks, barrels, casks or packages with the names of the persons for whom inspected, and the moneys received for such inspection, which record shall be open to the inspection of all persons interested.

Reports—Remittance of Fees, etc.

The Deputy Oil Inspector, and all deputy inspectors, shall, on the first Monday in each month forward to the State Oil Inspector true duplicate copies of such record for the preceding month, and shall pay over to the State Oil Inspector all moneys received for such inspection; and, on the fifteenth day of each month the State Oil Inspector shall pay to the State Treasurer all moneys received by him or by his deputies during the preceding calendar month, which shall be credited to the general fund of the State. In the month of January of each year the State Oil Inspector shall make and deliver to the Governor of the State duplicate reports of all inspections made by himself or his deputies during the preceding calendar year, showing the amount, kind and character of the oil, gasoline, benzine, distillate or other petroleum product inspected; the amount inspected for each individual, firm or corporation; the amount, kind and character of all such petroleum products rejected; the amount of fees collected, in detail, together with such other information as he may deem proper or the Governor may request.

Penalty for Violation of Law.

SEC. 6. If any person or persons, whether manufacturer, vendor or dealer, or as agent or representative of any manufacturer, vendor or dealer, shall sell or attempt to sell to any person, firm or corporation in this State, any illuminating oil, gasoline, benzine, distillate or any volatile product of petroleum, intended for use or consumption within this State for illuminating, manufacturing, domestic or power purposes, that has not been inspected and branded according to the provisions of this act; or shall sell or offer for sale any rejected oil or other product of petroleum for consumption within this State; or shall use any package, cask, barrel or other receptacle having the brand of the State Oil Inspector thereon, without the oils, gasoline, benzine, distillate or other petroleum products therein having been so inspected; or shall sell or dispose of any empty barrel, cask, package or other receptacle before thoroughly canceling, removing or effacing the inspection brand on the same; or shall alter or change or counterfeit any certificate, inspection brand or label, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine in any sum not exceeding three hundred ($300) dollars, or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

Inspector to Enter Complaint—Penalty for Non-Compliance.

SEC. 7. If the State Oil Inspector, or any deputy State Oil Inspector, shall know or be informed of the violation of any of the provisions of this act, it shall

be his duty to enter a complaint in a court of competent jurisdiction against the person so offending. If said State Oil Inspector, or any deputy State Oil Inspector, having knowledge of the violation of the provisions of this act shall fail or neglect to enter such complaint, or shall issue any false certificate, or shall falsely brand any oil, gasoline, benzine, distillate or volatile product of petroleum, or shall while in office traffic, directly or indirectly, in any article or substance which it is his duty to inspect, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine in any sum not exceeding one thousand ($1,000) dollars, or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

Repeal of Former Laws.

SEC. 8. Chapter 161 of the Session Laws of 1905 entitled "An Act creating the office of State Oil Inspector, providing for his compensation, and providing for the inspection of petroleum and its products used for illuminating purposes, and providing a penalty for the violation thereof," is hereby repealed.

Passed the House March 13th, 1907.

Passed the Senate March 9th, 1907.

Approved by the Governor March 15th, 1907.

"B"

(Being a copy of pages 684, 685 of Bulletin H:33 published Apr. 26, 1918, by the United States Geological Survey and entitled "Petroleum in 1916", by John D. Northrop.)

Petroleum marketed in the United States,

Year.	Pennsylvania and New York.	Ohio.	West Virginia.	California.	Kentucky and Tennessee.	Colorado.	Indiana.	Illinois.
	Barrels.	*Barrels.*	*Barrels.*	*Barrels.*	*Barrels.*	*Barrels.*	*Barrels.*	*Barrels.*
1859	2,000							
1860	500,000							
1861	2,113,609							
1862	3,056,690							
1863	2,611,309							
1864	2,116,109							
1865	2,497,700							
1866	3,597,700							
1867	3,347,300							
1868	3,646,117							
1869	4,215,000							
1870	5,260,745							
1871	5,205,234							
1872	6,293,194							
1873	9,893,786							
1874	10,926,945							
1875	8,787,514							
1876	8,968,900	31,763	120,000	12,000				
1877	13,135,475	29,808	172,000	13,000				
1878	15,163,462	26,179	180,000	15,227				
1879	19,685,178	29,112	180,000	19,858				
1880	26,027,631	38,940	179,000	40,352				
1881	27,376,500	33,867	151,000	99,862				
1882	30,053,500	39,761	128,000	128,636				
1883	23,128,289	47,632	126,000	142,857	4,755			
1884	23,772,209	90,081	90,000	262,000	4,148			
1885	20,776,041	661,580	91,000	325,000	5,164			
1886	25,798,000	1,782,970	102,000	377,145	4,729			
1887	22,356,193	5,022,632	145,000	678,572	4,791	76,245		
1888	16,488,668	10,010,868	119,448	690,333	5,000	297,612		
1889	21,487,435	12,471,466	544,113	303,220	5,400	316,476	33,375	1,460
1890	28,458,208	16,124,656	492,578	307,360	6,000	368,842	63,496	900
1891	33,009,299	17,740,301	2,406,218	323,600	9,000	665,482	136,634	675
1892	28,422,377	16,362,921	3,810,096	385,049	6,500	824,000	698,068	521
1893	20,314,513	16,249,769	8,445,412	470,179	3,000	594,390	2,335,293	400
1894	19,019,990	16,792,154	8,577,624	705,969	1,500	515,746	3,688,666	300
1895	19,144,390	19,545,233	8,120,125	1,208,482	1,500	438,232	4,386,132	200
1896	20,584,421	23,941,169	10,019,770	1,252,777	1,680	361,450	4,680,732	250
1897	19,262,066	21,560,515	13,080,045	1,903,411	322	384,934	4,122,356	500
1898	15,948,464	18,738,708	13,615,101	2,257,207	5,568	444,383	3,730,907	300
1899	14,374,512	21,142,108	13,910,630	2,642,095	18,280	390,278	3,848,182	360
1900	14,559,127	22,362,730	16,195,675	4,324,484	62,259	317,385	4,874,392	200
1901	13,931,666	21,648,083	14,177,126	8,786,330	137,259	460,520	5,757,086	250
1902	13,183,610	21,014,231	13,513,345	13,984,208	185,331	396,901	7,480,806	200
1903	12,518,134	20,480,286	12,899,395	24,382,472	554,286	483,925	9,186,411	
1904	12,239,030	18,876,631	12,644,686	29,649,434	998,284	501,763	11,339,124	
1905	11,554,777	16,346,660	11,578,110	33,427,473	1,217,337	376,238	10,964,247	181,084
1906	11,500,410	14,787,763	10,120,935	33,098,598	1,213,548	327,582	7,673,477	4,397,050
1907	11,211,606	12,207,448	9,095,299	39,748,375	820,844	331,851	5,128,037	24,281,973
1908	10,584,453	10,838,797	9,523,176	44,854,737	f 727,767	379,653	3,283,629	33,686,238
1909	10,434,500	10,632,793	10,745,092	55,471,601	f 639,016	310,861	2,296,086	30,998,339
1910	9,848,500	9,916,370	11,753,071	73,010,560	f 468,774	239,794	2,159,725	33,143,362
1911	9,200,673	8,317,112	9,795,464	81,134,391	f 472,458	226,926	1,695,289	31,317,038
1912	8,712,076	a 8,969,007	12,128,902	g 87,272,393	f 484,388	206,052	970,009	28,601,308
1913	8,865,493	8,781,468	11,567,299	97,788,525	f 524,568	188,799	956,095	23,893,899
1914	9,109,309	8,536,352	9,680,033	93,775,327	f 502,441	222,773	1,335,456	21,919,749
1915	8,726,483	7,825,320	9,204,708	86,591,535	f 417,274	208,475	875,758	19,041,695
1916	8,466,481	7,744,511	8,731,184	90,951,936	1,203,246	197,235	769,036	17,714,235
	771,373,177	448,331,841	278,228,797	918,817,030	10,736,490	11,054,853	104,468,594	269,082,546

a Includes the production of Michigan.
b Includes the production of Oklahoma.
c Included with Kansas.
d Estimated.
e Includes production of Utah.

PETROLEUM.

1859–1916, in barrels of 42 gallons.

Kansas.	Texas.	Missouri.	Oklahoma.	Wyoming.	Louisiana.	Montana.	United States.	Total value.	Year.
Barrels.	*Barrels.*	*Barrels.*	*Barrels.*	*Barrels.*	*Barrels.*	*Barrels.*	*Barrels.*		
.....	.....	.....	.....	.....	.....	.....	2,000	$32,000	1859
.....	.....	.....	.....	.....	.....	.....	500,000	4,800,000	1860
.....	.....	.....	.....	.....	.....	.....	2,113,609	1,035,668	1861
.....	.....	.....	.....	.....	.....	.....	3,056,600	3,209,525	1862
.....	.....	.....	.....	.....	.....	.....	2,611,309	8,225,663	1863
.....	.....	.....	.....	.....	.....	.....	2,116,109	20,896,576	1864
.....	.....	.....	.....	.....	.....	.....	2,497,700	16,459,853	1865
.....	.....	.....	.....	.....	.....	.....	3,597,700	13,455,398	1866
.....	.....	.....	.....	.....	.....	.....	3,347,300	8,066,993	1867
.....	.....	.....	.....	.....	.....	.....	3,645,117	13,217,174	1868
.....	.....	.....	.....	.....	.....	.....	4,215,000	23,730,450	1869
.....	.....	.....	.....	.....	.....	.....	5,260,745	20,503,754	1870
.....	.....	.....	.....	.....	.....	.....	5,205,234	22,591,190	1871
.....	.....	.....	.....	.....	.....	.....	6,293,194	21,440,503	1872
.....	.....	.....	.....	.....	.....	.....	9,893,788	18,100,464	1873
.....	.....	.....	.....	.....	.....	.....	10,926,945	12,647,527	1874
.....	.....	.....	.....	.....	.....	.....	8,787,514	7,368,133	1875
.....	.....	.....	.....	.....	.....	.....	9,132,669	22,982,822	1876
.....	.....	.....	.....	.....	.....	.....	13,350,363	31,788,566	1877
.....	.....	.....	.....	.....	.....	.....	15,396,868	18,044,520	1878
.....	.....	.....	.....	.....	.....	.....	19,914,146	17,210,708	1879
.....	.....	.....	.....	.....	.....	.....	26,286,123	24,600,638	1880
.....	.....	.....	.....	.....	.....	.....	27,661,258	25,448,339	1881
.....	.....	.....	.....	.....	.....	.....	30,349,897	23,631,165	1882
.....	.....	.....	.....	.....	.....	.....	33,449,633	25,790,252	1883
.....	.....	.....	.....	.....	.....	.....	24,218,438	20,595,966	1884
.....	.....	.....	.....	.....	.....	.....	21,853,785	19,198,243	1885
.....	.....	.....	.....	.....	.....	.....	28,064,841	19,906,313	1886
.....	.....	.....	.....	.....	.....	.....	28,283,483	18,877,094	1887
.....	.....	.....	.....	.....	.....	.....	27,612,025	17,947,620	1888
.....	.....	.....	.....	.....	.....	.....	35,163,513	26,963,340	1889
500	48	20	.....	.....	.....	.....	45,823,572	35,365,105	1890
1,200	54	278	.....	.....	.....	.....	51,292,655	30,526,553	1891
1,400	54	25	30	.....	.....	.....	50,514,657	25,908,463	1892
5,000	45	10	80	.....	.....	.....	48,431,066	28,950,326	1893
18,000	50	50	10	.....	.....	.....	49,344,516	35,522,095	1894
40,000	60	8	130	2,369	.....	.....	52,892,276	57,632,296	1895
44,430	50	10	37	3,455	.....	.....	60,960,361	58,518,709	1896
113,571	1,450	43	170	2,878	.....	.....	60,475,516	40,874,072	1897
81,098	65,975	18	625	3,650	.....	.....	55,364,233	44,193,359	1898
71,980	546,070	10	.....	5,475	.....	.....	57,070,850	64,603,904	1899
60,700	669,013	132	.....	5,560	.....	.....	63,620,529	75,989,313	1900
74,714	836,039	a 1,602	6,472	5,450	.....	.....	69,389,194	66,417,335	1901
179,151	4,393,658	a 2,335	10,000	5,400	.....	.....	88,766,916	71,178,910	1902
331,749	18,083,658	a 757	37,100	6,253	548,617	.....	100,461,337	94,694,050	1903
932,214	17,955,572	a 3,000	138,911	8,960	917,771	.....	117,080,960	101,175,455	1904
4,250,779	22,241,413	a 2,572	1,366,748	11,542	2,958,958	.....	134,717,580	84,157,399	1905
b12,013,495	28,136,189	a 3,100	(c)	8,454	8,910,416	.....	126,493,936	92,444,735	1906
b21,718,648	12,567,897	a 3,500	(c)	d 7,000	9,077,528	.....	166,095,335	120,106,749	1907
2,409,521	12,322,696	a 4,000	43,524,128	e 9,339	5,000,221	.....	178,527,355	129,079,184	1908
1,801,781	11,206,464	a 15,246	45,798,765	e 17,775	5,788,874	.....	183,170,874	128,328,487	1909
1,283,764	9,534,467	a 5,750	47,859,218	e 20,056	3,059,531	.....	209,557,348	127,899,688	1910
1,128,668	8,899,286	a 3,615	52,028,718	e 115,430	6,841,395	.....	220,449,391	134,044,752	1911
1,278,819	9,526,474	a 7,995	56,069,637	e 186,695	10,720,420	.....	222,935,044	164,213,247	1912
1,592,796	11,735,057	(b)	51,427,071	1,572,306	9,263,439	.....	248,446,230	237,121,388	1913
2,375,029	15,009,478	f 10,843	63,579,384	2,406,522	12,498,828	.....	265,762,535	214,135,215	1914
3,103,585	20,068,184	f 7,792	73,631,724	3,560,375	14,309,435	.....	281,104,104	179,462,890	1915
2,823,487	24,942,701	f 14,265	97,915,243	4,245,525	18,191,539	.....	300,767,158	330,899,868	1916
8,738,077	27,644,605	f 7,705	107,071,715	6,234,137	15,248,138	44,917			
86,463,150	256,380,687	94,682	640,465,916	18,444,606	123,335,110	44,917	3,917,328,402	3,302,288,094	

f No production in Tennessee recorded.
a Includes small production of Alaska.
b No production in Missouri; Michigan included in Ohio.
c Includes production of Alaska, Michigan, and New Mexico.
d Includes production of Alaska and Michigan.

Supreme Court

OF THE

UNITED STATES

No. 177.

OCTOBER TERM, 1918

STRATTON'S INDEPENDENCE, a corporation,
Plaintiff in Error,

v.

H. T. Graves, and H. T. Graves as Commissioner of Agriculture of the State of Washington,
Defendants in Error.

Brief of Defendants in Error

W. V. Tanner,
Attorney General.

L. L. Thompson,
Assistant Attorney General.

Glenn J. [illegible],
Assistant Attorney General.

Attorneys for Defendants in Error.

Olympia, Washington, Public Printer

INDEX.

TABLE OF CASES CITED.

IN THE

Supreme Court

OF THE

UNITED STATES

No. 177.

OCTOBER TERM, 1918

STANDARD OIL COMPANY, a corporation,
Plaintiff in Error,

v.

H. T. GRAVES, and H. T. GRAVES as Commissioner of Agriculture of the State of Washington,
Defendants in Error.

Brief of Defendants in Error

STATEMENT.

This is an action to enjoin the enforcement of the oil inspection act (ch. 192, Laws of Washington 1917; secs. 6050 to 6058, inc., Rem. & Bal. Code), and particularly that portion of the act which provides for the collection of inspection fees. It is alleged in the amended complaint that the respondent is a California corporation which is authorized to do business in this state; that it manufactures and re-

fines petroleum products of various kinds in the state of California and ships such products into the state of Washington where such products are sold "in large quantities for use and consumption in the state of Washington." Paragraph 6 of the complaint states in detail the amounts collected and disbursed by the state in the administration of this act and chapter 161, Laws of 1905, which preceded it and which had to do with the same subject. This statement shows a net revenue of $255,672.93 between the years 1905 and 1914, inclusive. By way of legal conclusion it is then alleged that the act violates the constitution of the United States in the following particulars: (1) It imposes an impost and duty on imports in violation of article 1, section 10, clause 2; (2) it levies a tax upon articles exported from a state in violation of article 1, section 9, clause 5; (3) it interferes with interstate commerce in violation of article 1, section 8, clause 3; (4) it takes the property of the plaintiff in error without due process of law and denies to it the equal protection of the law. The complaint further alleges that this act violates the state constitution in several respects.

The question of repugnance to the state constitution is eliminated from the case by the decision of the supreme court of the state.

The complaint shows but two material things which do not appear upon the face of the statute here in question: First, that respondent is affected by this act; and, second, that the inspection fees collected have for some years exceeded the cost of

inspection materially. The manner in which the inspection is made, or the way in which respondent's products are shipped into the state, or the points at which they are inspected, are not set forth in the complaint; and we take it, therefore that respondent cannot now raise any objection based on the method of inspection followed by the appellant unless the court can say that no other method of inspection is permissible under the act.

Briefly summarized, chapter 192, Laws of 1907, creates the office of state oil inspector, provides for the inspection of illuminating oils, gasoline, benzine, distillate and other volatile products of petroleum.

Section 3 of the act then reads in part as follows:

"All gasoline, benzine, distillate or other volatile product of petroleum intended for use or consumption in this state for illuminating, manufacturing, domestic or power purposes, before being sold or offered for sale by any firm, corporation, manufacturer, dealer, vendor, or other person, shall first be inspected and tested for its specific gravity, and, after having been so inspected and tested, the State Oil Inspector, or his deputies, shall issue a certificate of inspection thereof and shall cause every package, barrel, cask or other receptacle thereof to be labeled or branded with its exact specific gravity over his official signature."

Section 4 provides for the collection of certain fees for this inspection.

Section 6 reads as follows:

"If any person or persons, whether manufacturer, vendor or dealer, or as agent or representative of any manufacturer, vendor or dealer, shall sell or attempt to sell to any person, firm or corporation in this state, any illumniating oil, gasoline, benzine, dis-

tillate or any volatile product of petroleum, intended for use or consumption within this state for illuminating, manufacturing, domestic or power purposes, that has not been inspected and branded according to the provisions of this act; or shall sell or offer for sale any rejected oil or other product of petroleum for consumption within this state; or shall use any package, cask, barrel or other receptacle having the brand of the State Oil Inspector thereon, without the oils, gasoline, benzine, distillate or other petroleum products therein having been so inspected; or shall sell or dispose of any empty barrel, cask, package or other receptacle before thoroughly cancelling, removing or effacing the inscription brand on the same; or who shall alter or change or counterfeit any certificate, inspection brand or label, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine in any sum not exceeding three hundred ($300) dollars, or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment."

In other words, the act levies an excise tax upon the privilege of selling petroleum products measured by the amount of such products inspected.

I.

The Act Does Not Violate Article 1, Section 10, Clause 2, of the Federal Constitution.

Article 1, section 10, clause 2, of the Federal constitution, provides:

"No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress."

It is assigned as error here and it was argued by counsel in the state court, that this act in some way imposes a duty on imports and exports, although it appears affirmatively from the complaint that all of respondent's products are manufactured in California and shipped into Washington for sale and consumption in this state. It nowhere appears that a dollar's worth of these products are brought in from foreign countries. This being the case, it would seem that a sufficient answer to this argument is to say that this clause of the Federal constitution applies only to articles imported from or exported to foreign countries, and does not apply to interstate commerce.

The question was first examined by this court in the case of *Woodruff v. Parham,* 8 Wallace 123, 19 L. Ed. 382, where the court went into the matter in detail, overruled some prior dictum of Chief Justice Marshall, and held that this provision of the Federal constitution applied only to imports from foreign countries.

The matter was again considered in the case of *Brown v. Houston,* 114 U. S. 622, 29 L. Ed. 257, where the court observed (p. 630):

"But in holding with the decision in *Woodruff v. Parham, (supra)*, that goods carried from one state to another are not imports or exports within the meaning of the clause which prohibits a state from laying any impost or duty on imports or exports, we do not mean to be understood as holding that a state may levy import or export duties on goods imported from or exported to another state. We only mean to say that the clause in question does not prohibit it.

Whether the laying of such duties by a state would not violate some other provision of the constitution, that, for example, which gives to Congress the power to regulate commerce with foreign nations, among the several states, and with the Indian tribes, is a different question."

The same view was reiterated in *Pittsburg & Southern Coal Company v. Bates*, 156 U. S. 577, 39 L. Ed. 538, where the court said (p. 587):

"In considering the questions presented the court observed that it was decided in the case of *Woodruff v. Parham*, 75 U. S. 8 Wall. 123 (19:382) that the term 'imports' as used in that clause of the constitution which declares that 'no state shall without the consent of Congress, lay any imposts or duties on imports or exports,' does not refer to articles carried from one state to another, but only to articles imported from foreign countries into the United States, and therefore it was not necessary to consider the questions thus raised, and which were based upon the assumption that the tax complained of was an impost or duty upon imports."

And again in *Patapsco Guano Company v. Board of Agriculture*, 171 U. S. 345-350, 43 L. Ed. 191-193, the same rule was announced by the court in considering the validity of an act imposing an inspection fee on fertilizers.

In *American Steel & Wire Company v. Speed*, 192 U. S. 500, 48 L. Ed. 538, the court re-examined the entire subject and again affirmed the rule laid down in *Woodruff v. Parham*, 8 Wallace 123, 19 L. Ed. 382, in the following language (p. 519):

"But the goods not having been brought from abroad, they were not imported in the legal sense, and were subject to state taxation after they had reached their destination and whilst held in the state for sale.

This is as conclusively foreclosed by the decisions of this court as is the doctrine resting upon the decisions in *Brown v. Maryland, Woodruff v. Parham,* 8 Wall 123, 19 L. Ed. 383; *Brown v. Houston,* 114 U. S. 622, 29 L. Ed. 257."

Likewise in *McLean v. Denver & Rio Grande R. R. Co.,* 203 U. S. 38, 51 L. Ed. 78, the court, in considering a hide inspection law of New Mexico, said (p. 49):

"As to the objection predicated on § 10 of article 1, that section can have no application to the present case, as that provision directly applies only to articles imported or exported to foreign countries."

We would not burden the court by the discussion of a proposition so fundamental were it not for the fact that the supreme courts of North Dakota and Ohio have been misled by some language used in the case of *Foote v. Stanley,* 232 U. S. 494, 58 L. Ed. 698, to which we shall hereafter refer.

The cases involving duties and imposts upon imports and exports have in some instances a limited application to laws affecting interstate commerce, and the erroneous ideas advanced by counsel in the lower court, and which also appear to have been shared in by the supreme courts of Ohio and North Dakota, result from a failure to properly understand the nature of this application and its proper limitations. It is well settled that a state cannot lawfully interfere with interstate commerce. The supreme court of the United States, however, has held in many cases that a state, acting under the police power and in order to protect itself, may inspect articles while

in the course of interstate commerce and collect an inspection fee therefor.

Patapsco Guano Company v. Board of Agriculture, 171 U. S. 345, 43 L. Ed. 191;

Red C Oil Company v. North Carolina, 222 U. S. 380, 56 L. Ed. 240;

McLean v. Denver & Rio Grande, 203 U. S. 38, 51 L. Ed. 78.

It has further held, however, that this right is strictly one incident to the police power, and that where an ostensible inspection fee is in reality a tax levied upon interstate commerce, then the court will declare the law invalid as interfering with that commerce, and to that end it will, in such cases, inquire whether the revenues which accrue are materially in excess of the cost of inspection.

Foote v. Stanley, 232 U. S. 494, 58 L. Ed. 698.

In considering whether or not a particular inspection law, which admittedly operates upon interstate commerce, is one in fact or really a taxing measure, the courts very properly, by analogy, apply the test enunciated with respect to importation fees imposed on imports from or exports to foreign countries, *i. e.*, the fees cannot materially exceed what is necessary for their execution. This is as far as the analogy goes, however, and should not be lost sight of. Before it is applicable, the court must first say that the act in question imposes a burden on interstate commerce. An inspection law which operates upon an article once in the course of interstate commerce, but after the transit has ceased and the commerce ended, does not impose a burden upon that

commerce and is not illegal even though it produces a revenue far in excess of the cost of inspection, and even though a similar fee could not lawfully be collected for the inspection of an import from a foreign country before a sale in the original package.

The distinction in the two cases is best illustrated by a comparison of the facts in the case of *Brown v. Maryland*, 12 Wheaton 419, 6 L. Ed. 678, and *Woodruff v. Parham*, 8 Wallace 123, 19 L. Ed. 382. In *Brown v. Maryland* the court held that a state statute which required persons engaged in the sale of imports from foreign countries in the original package to pay a license fee was in violation of article 1, section 10, clause 2, of the United States constitution. By way of dictum, Justice Marshall observed in that case that he supposed that the same principle applied to importations from other states.

In *Woodruff v. Parham* the soundness of this dictum was presented to the court. That case involved the validity of a city ordinance of Mobile which imposed an auctioneer's license tax upon persons engaged in selling goods brought into Alabama from other states and sold in the original package. It will thus be seen that this case presented exactly the same facts as did the *Brown* case with the one exception that it only involved interstate commerce, whereas the *Brown* case involved foreign commerce. After an exhaustive discussion of the meaning of the phrase "imports or exports," the court concluded that it did not include articles brought in from other states, saying (p. 140):

"The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another State, and whether the goods sold are the produce of that State or some other. There is no attempt to discriminate injuriously against the products of other States or the rights of their citizens, and the case is not, therefore, an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity possessed by citizens of Alabama. But a law having such operation would, in our opinion, be an infringement of the provisions of the Constitution which relate to those subjects and, therefore, void. There is also, in addition to the restraints which those provisions impose by their own force on the States, the unquestioned power of Congress, under the authority to regulate commerce among the States, to interpose, by the exercise of this power, in such a manner as to prevent the state from any oppressive interference with the free interchange of commodities by the citizens of one State with those of another."

This is shown by the review of these cases contained in the subsequent decision of *Brown v. Houston*, 114 U. S. 622, 29 L. Ed. 257, where the court, discussing its conclusion in *Woodruff v. Parham*, said (p. 628):

"A contrary result must have been reached under the ruling in *Brown v. Maryland*, 12 Wheat. 419, if the constitutional prohibition referred to had been held to include imports from other States as well as imports from foreign countries; for, at the time the tax was laid, the condition of the goods, in reference to their introduction into the State, was precisely the same in one case as the other. This court, however, after an elaborate examination of the question, held that the terms 'imports' and 'exports' in the clause under consideration had reference to goods brought from or carried to foreign countries alone,

and not to goods transported from one State to another."

It follows from this, therefore, that unless the court can say that this act upon its face imposes this fee upon articles while being transported in the course of interstate commerce, or in other words requires inspection before the transit is ended, it is not concerned with the reasonableness of the fee insofar as any Federal question is concerned. If the court can say that the act does so operate, it will hold it void unless the fees are reasonable, not because it constitutes a duty or impost upon imports, but because it interferes with interstate commerce, a question which we shall hereafter consider.

With this distinction in mind, the case of *Foote v. Stanley*, 232 U. S. 494, 58 L. Ed. 698, is easily explained. That case involved the validity of a Maryland statute which imposed an inspection fee upon oysters coming into Maryland in vessels, "upon all oysters unloaded from vessels at the place where said oysters are to be no further shipped in bulk in vessels." It seems to have been admitted by both sides that this act did, in fact, operate on interstate commerce before the transit was completed. Proceeding upon that assumption, the court very properly concluded that since the fees received were largely in excess of the cost of inspection, the act was void because it interfered with interstate commerce. While the court uses some language which, read superficially, might support the idea that its final determination is

in some measure based on article 1, section 10, clause 2, the decision itself is based solely upon the commerce clause, and the reference made to the reasonableness of the inspection fees is simply an invocation of the rule long followed by the court when an interference with interstate commerce is once admitted. In other words, the court applied the criterion of reasonableness announced in article 1, section 10, clause 2, because an interference with interstate commerce was admitted and was so apparent as to not require discussion; but it did not say that an inspection law which produces excess revenues is void when it does not operate upon an article in the course of transportation between two states until after the transit is completed. Neither did the court say that excess revenues are any evidence of such an interference. This, we think, is apparent from the fact that in the subsequent decision of *United States v. Hvoslef*, 237 U. S. 1, 59 L. Ed. 813, the case of *Woodruff v. Parham* was cited with express approval.

What has just been said disposes of the cases of *Castle v. Mason*, 91 Ohio St. 296, 110 N. E. 463, and *Bartels Northern Oil Company v. Jackman*, 29 N. Dak. 236, 150 N. W. 576, upon which counsel relied very strongly in the state court. Both of these cases were decided upon the assumption that article 1, section 10, clause 2, applies to interstate commerce; a conclusion which, as we have shown, is in direct contradiction with the uniform decisions of the United States supreme court.

II.

This Act Does Not Violate Article 1, Section 9, Clause 5, of the Federal Constitution.

Article 1, section 9, clause 5, of the Federal constitution, provides:

"No tax or duty shall be laid on articles exported from any state."

This clause was construed by the supreme court of the United States in the case of *Dooley v. United States*, 183 U. S. 151, 46 L. Ed. 128, where the court, after applying the reasoning of *Woodruff v. Parham*, held that this provision, like the one just considered, applied only to foreign commerce. A similar conclusion was reached in *United States v. Hvoslef*, 237 U. S. 1, 59 L. Ed. 813.

III.

Interstate Commerce.

As has been pointed out, if an inspection law is made operative upon an article while it is moving in interstate commerce, it is probably invalid if it produces a revenue materially in excess of the cost of inspection. Upon the other hand, if it does not so operate, it is immaterial whether the fees are reasonable or unreasonable, and whether they are levied under the police power or the taxing power, insofar as any Federal question is concerned.

In determining whether this act does operate upon petroleum products while they are still in course of transit, the court is not concerned with the reasonableness or the unreasonableness of these fees. That

only becomes material in the event that the court should conclude that the act does so operate. Neither is the court concerned with some possible illegal application of the act by the oil inspector, because the complaint does not allege the manner in which this inspection is made, and the demand is for a general adjudication of the invalidity of the act under any circumstances. If the court can say, therefore, that it is possible to enforce this act without imposing a direct burden upon interstate commerce, it is bound to presume that the officers of the state will enforce it in that manner, and to sustain the act even though it be admitted that this is a revenue measure.

The interstate commerce clause of the Federal constitution has been a prolific source of litigation and the decisions are almost innumerable upon the subject.

In *Brown v. Maryland*, 12 Wheaton 419, 6 L. Ed. 678, the court held that a state could not levy a tax upon the business of selling goods in the original package which had been imported from foreign countries.

In *Woodruff v. Parham*, 8 Wall. 123, 19 L. Ed. 382, it was sought to extend this doctrine to shipments of goods in original packages between states. The court, however, refused to do this and held that the uniform occupation tax imposed by the city ordinances upon all auctioneers was not invalid even though levied on an auctioneer who sold "the products of states other than Alabama, and sold the same in

Mobile to purchasers in the original unbroken packages."

In *Hinson v. Lott*, 8 Wall. 148, 19 L. Ed. 387, the same court had before it a statute of Alabama which provided:

"Before it shall be lawful for any dealer or dealers in spirituous liquors to offer any such liquors for sale within the limits of this State, such dealer or dealers introducing any such liquor into the State for sale shall first pay the tax collector of the county into which such liquors are introduced, a tax of fifty cents per gallon upon each and every gallon thereof."

The court held that since the previous section of the same act required the same tax upon the sale of liquors manufactured in the state there was no discrimination and the act was valid, saying (p. 153):

"As the effect of the Act is such as we have described, and it institutes no legislation which discriminates against the products of sister States, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the State, we do not see in it an attempt to regulate commerce, *but an appropriate and legitimate exercise of the taxing power of the States.*" (Italics ours.)

We call the particular attention of the court to the analogy between the Alabama act and the case at bar. That act like this one levied an excise tax upon a liquid based upon volume and prohibited under criminal penalties a sale of the article until the tax had been paid. The Alabama act was sustained as a pure revenue measure and with no pretense that it depended upon the police power for its validity. There is no distinction between the two cases.

In *Brown v. Houston*, 114 U. S. 622, 29 L. Ed. 257, the same idea was expressed in the following language (p. 633):

"It cannot be seriously contended, at least in the absence of any congressional legislation to the contrary, that all goods which are the product of other States are to be free from taxation in the State to which they may be carried for use or sale. Take the City of New York, for example. When the assessor of taxes goes his round, must he omit from his list of taxables all goods which have come into the city from the factories of New England and New Jersey, or from the pastures and grain fields of the West? If he must, what will be left for taxation? And how is he to distinguish between those goods which are taxable and those which are not? With the exception of goods imported from foreign countries, still in the original packages, and goods in transit to some other place, why may he not assess all property alike that may be found in the city, being there for the purpose of remaining there till used or sold, and constituting part of the great mass of its commercial capital—provided always, that the assessment be a general one, and made without discrimination between goods the product of New York, and goods the product of other States? Of course the assessment should be a general one, and not discriminative between goods of different States. The taxing of goods coming from other States, as such, or by reason of their so coming, would be a discriminating tax against them as imports, and would be a regulation of interstate commerce, inconsistent with that perfect freedom of trade which Congress has seen fit should remain undisturbed. But if, after their arrival within the State—that being their place of destination for use or trade—if, after this, they are subjected to a general tax laid alike on all property within the city, we fail to see how such a taxing can be deemed a regulation of commerce which would have the objectionable effect referred to."

In *Howe Machine Company v. Gage,* 100 U. S. 676, 25 L. Ed. 754, the court sustained a statute of Tennessee which imposed a license tax upon persons selling machines by sample, even though enforced against one who had sold machines manufactured in Connecticut and shipped to him for the purpose of sale.

In *Emert v. Missouri,* 156 U. S. 296, 39 L. Ed. 430, a license tax levied upon all peddlers was held not an interference with interstate commerce even as to peddlers of goods sent to them by manufacturers in other states.

The purport of the case of *Bacon v. Illinois,* 227 U. S. 504, 57 L. Ed. 615, is succinctly stated in the headnote of the Lawyers' Edition, as follows:

"2. Grain shipped from southern and western states under contracts for its transportation to eastern cities, but afterwards purchased while in transit by a resident of Illinois, with the intent to forward it promptly according to the shipping contracts, after exercising the privilege reserved therein of removing it from the cars at Chicago for inspection, weighing, etc., may be assessed for local taxation while actually in his private grain elevator at Chicago, to which it had been removed for the aforesaid purposes."

As this decision contains an excellent discussion we will quote from it at some length (p. 515):

"But neither the fact that the grain had come from outside the state, nor the intention of the owner to send it to another state, and there to dispose of it, can be deemed controlling when the taxing power of the state of Illinois is concerned. The property was held by the plaintiff in error in Chicago for his own purposes and with full power of disposition. It was not being actually transported, and it was not

held by carriers for transportation. The plaintiff in error had withdrawn it from the carriers. The purpose of the withdrawal did not alter the fact that it had ceased to be transported and had been placed in his hands. He had the privilege of continuing the transportation under the shipping contracts, but of this he might avail himself or not, as he chose. He might sell the grain in Illinois or forward it, as he saw fit. It was in his possession, with the control of absolute ownership. He intended to forward the grain after it had been inspected, graded, etc., but this intention, while the grain remained in his keeping, and before it had been actually committed to the carriers for transportation, did not make it immune from local taxation. He had established a local facility in Chicago for his own benefit, and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the state in an assessment for taxation which was made in the usual way, without discrimination. * * *

"The question, it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce, *but whether a particular exercise of state power, in view of its nature and operation, must be deemed to be in conflict with this paramount authority. American Steel & Wire Co. v. Speed*, 192 U. S. pp. 521, 522, 48 L. Ed. 546, 547, 24 Sup. Ct. Rep. 365. *Thus, goods within the state may be made the subject of a nondiscriminatory tax, though brought from another state, and held by the consignee for sale in the original packages. Woodruff v. Parham*, 8 Wall. 123, 19 L. Ed. 382. In *Brown v. Houston*, 114 U.S. 622, 29 L.Ed.257, 5 Sup. Ct. Rep. 1091, the coal on which the local tax was sustained had not been unloaded, but was lying in the boats in which it had been brought into the state, and from which it was offered for sale. In *Pittsburg & S. Coal Co. v. Bates*, 156 U. S. 577, 39 L. Ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415, coal had been shipped from Pittsburg to Baton Rouge in barges which, to accommodate the owner's business, had

been moored about nine miles above the point of destination. The coal, while remaining on the barges under these conditions, was held subject to taxation. In *General Oil Co. v. Crain*, 209 U. S. 211, 52 Ed. 754, 28 Sup. Ct. Rep. 475, the oil which had been brought from Pennsylvania to Memphis, a distributing point, was held in tanks, one of which was kept for oil for which orders had been received from Arkansas, Louisiana, and Mississippi prior to the shipment from Pennsylvania, and which had been shipped especially to fill such orders. The tank was marked, 'Oil Already Sold in Arkansas, Louisiana, and Mississippi.' The local tax upon this oil, which remained in Tennessee only long enough (a few days) to be properly distributed according to the orders, was sustained.

"In the present case the property was held within the state for purposes deemed by the owner to be beneficial; it was not in actual transportation; and there was nothing inconsistent with the Federal authority in compelling the plaintiff in error to bear with respect to it, in common with other property in the state, his share of the expenses of the local government."

This proposition is illustrated in the following cases:

Woodruff v. Parham, 8 Wall, 123, 19 L. Ed. 383;

Brown v. Houston, 114 U. S. 622, 29 L. Ed. 257;

Pittsburg etc. Co. v. Bates, 156 U. S. 577, 39 L. Ed. 538;

Kelly v. Rhodes, 188 U. S. 1, 47 L. Ed. 359;

Diamond Match Co. v. Ontonagon, 188 U. S. 82, 47 L. Ed. 394;

American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. Ed. 538;

General Oil Company v. Crain, 209 U. S. 211, 52 L. Ed. 754;

Bacon v. Illinois, 227 U. S. 504, 57 L. Ed. 615;

Susquehanna Coal Co. v. South Amboy, 228 U. S. 665, 57 L. Ed. 1015;

Judson on Interstate Commerce, sec. 17.

From these decisions it will thus be seen that the original package doctrine enunciated by Justice Marshall in *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678, was not extended to a non-discriminatory tax levied upon articles brought from other states and held for sale in the original package, or upon the privilege of selling such articles.

Contemporaneous with these decisions, however, another line of cases grew up, in which the original package doctrine was to some extent applied to interstate shipments. The case of *Leisy v. Hardin*, 135 U. S. 100, 34 L. Ed. 128, is typical of these decisions. In that case the court held that a state could not lawfully *prohibit* the sale of intoxicating liquors in the original package when shipped in from another state.

In *Minnesota v. Barber*, 136 U. S. 313, 34 L. Ed. 455, it was held that a meat inspection law which virtually operated to prevent the introduction of meat from other states was invalid.

The same conclusion was reached in *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. Ed. 49, with respect to a statute prohibiting the sale of oleomargarine in original packages.

It was contended by interested parties that there is no difference in principle between the absolute prohibition of a sale in the original package and a non-discriminatory tax upon the goods or the privilege of selling, measured by the value or the volume of the goods, and that since the power was denied in the one case, it must also be denied in the other, with the result that the case of *Brown v. Houston*, 114 U. S. 622, was overruled by *Leisy v. Hardin*, 135 U. S. 100, and companion cases.

This contention was considered and refuted in the case of *American Steel & Wire Company v. Speed*, 192 U. S. 500, 48 L. Ed. 538, where the court had before it the question of the validity of a merchant's privilege tax assessed against a corporation selling goods in the original package which had been brought into the state of Tennessee from other states. It was claimed in that case that under the rule announced in *Brown v. Maryland*, 12 Wheaton 419, and *Leisy v. Hardin*, 135 U. S. 100, merchants could not be compelled to pay a privilege tax for selling such goods in the original package. The court answered this contention in the following language (p. 520):

"We might well leave the unsoundness of the proposition to be demonstrated by what we have previously said, and also by the fact that, in *Leisy v. Hardin* and *Lyng v. Michigan*, and most of the similar cases relied on, the decisions in *Woodruff v. Parham* and *Brown v. Houston* were referred to without even an intimation that those cases were deemed to be overruled or even qualified. The earnestness with which the contention is pressed induces us, however, briefly to point out the misconception upon which it rests. *It results from assuming that the*

rule which governs in a case where there is an absolute prohibition is applicable where no such prohibition obtains. Brown v. Maryland illustrates the first of these cases, while *Woodruff v. Parham, Brown v. Houston, Leisy v. Hardin, Lyng v. Michigan* are examples of the other. Thus, in *Brown v. Maryland* there was an absolute want of power to tax imports, and it was held that a state enactment which operated to tax imports, whether directly or indirectly, was within the positive prohibition. In other words, that imports could not be taxed at all until they had completely lost their character as such. *Woodruff v. Parham* and *Brown v. Houston*, on the other hand, so far as interstate commerce was concerned, dealt with no positive and absolute inhibition against the exercise of the taxing power, but determined whether a particular exertion of that power by a state so operated upon interstate commerce as to amount to a regulation thereof, in conflict with the paramount authority conferred upon Congress. In order to fix the period when interstate commerce terminated, the criterion announced in *Brown v. Maryland*—that is, sale in the original packages at the point of destination—was applied. *The court, therefore, conceded that the goods which were taxed had not completely lost their character as interstate commerce, since they had not been sold in the original packages. As, however, they had arrived at their destination, were at rest in the state, were enjoying the protection which the laws of the state afforded, and were taxed without discrimination, like all other property, it was held that the tax did not amount to a regulation in the sense of the Constitution, although its levy might remotely and indirectly affect interstate commerce.* In *Leisy v. Hardin* and *Lyng v. Michigan* the same question in a different aspect was presented. The goods had reached their destination and the question was not the power of the state to tax them, *but its authority to treat the goods as not the subjects of interstate commerce, and to prohibit their introduction or sale.* This was held to be a regulation within the constitutional sense, and therefore void. The cases,

therefore, did not decide that interstate commerce was to be considered as having completely terminated at one time for the purposes of import taxation and at a different period for the purposes of interstate commerce. *But both cases, whilst conceding that interstate commerce was completely terminated only after the sale at the point of destination in the original packages, were rested upon the nature and operation of the particular exertion of state authority considered in the respective cases.*" (Italics ours.)

Tested by the rules announced in the foregoing cases, it is submitted that there is nothing in this act which infringes upon the commerce clause of the constitution. It does not prohibit the solicitation of interstate business as did the act adjudged invalid in *Robbins v. Shelby County*, 120 U. S. 489, 30 L. Ed. 694; it does not prohibit the introduction of goods into the state of Washington as did the acts considered in *Leisy v. Hardin*, 135 U. S. 100, 34 L. Ed. 128, and *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. Ed. 49; nor does it impose a tax upon the goods before the transit is completed as did the Maryland statute in *Foote v. Stanley*, 232 U. S. 494, 58 L. Ed. 698. It merely provides that all such products of petroleum, before being sold or offered for sale, shall, at some time and place, be inspected, just as did the statutes sustained in *General Oil Co. v. Crain*, 209 U. S. 211, 52 L. Ed. 754, and *Hinson v. Lott*, 8 Wall. 148, 19 L. Ed. 387. The act does not specify at what time or in what manner the inspection shall be made, and there is certainly nothing in it which can be construed as directing the oil inspector to make it upon articles which are still moving in interstate commerce.

In view of the significant silence of the complaint upon this matter, and of the presumption which courts always indulge in in passing upon the validity of statutes, this court must presume that the appellant will not seek to make this inspection while the petroleum products of respondent are moving in interstate commerce.

The question is really decided by this court in the case of *General Oil Company v. Crain*, 209 U. S. 211, 52 L. Ed. 754, which is as nearly in point upon the facts as two cases ever are. In that case the court had before it the question of the validity of an oil inspection act of Tennessee. This act was chapter 349 of the Session Laws of 1899 (Laws 1899, p. 811). In substance it provided for the appointment of county oil inspectors who were directed to make a test of various products of petroleum somewhat similar to the tests provided by section 6052, Rem. & Bal. Code. Section 4 of this act then provided that persons selling such products, which had not been inspected, should be guilty of a misdemeanor, just as does section 6055, Rem. & Bal. Code. Section 8 of the Tennessee act provided:

"Be it further enacted, That the term of office for said inspectors shall be for two years, or until removed by the governor, and each shall demand and receive from the owner of the illuminating oils or fluids inspected and marked and branded as in this act provided, twenty-five cents for each barrel, and ten cents for each smaller package."

Section 9 also provided:

"Be it further enacted, That all oils and fluids, the product of coal, petroleum, or other bituminous

substance, which may be used for illuminating purposes, sent from other states to counties in this state, without inspectors of oils and fluids, or sent from counties in this state without the barrels and packages containing the same being branded by law by the inspectors of the county or city from which they were sent, may be inspected *in transitu*, in the hands of the carrier, forwarding agent, or warehouseman, and the inspector shall demand and receive for a single barrel sent to one party forty cents; for more than one barrel up to five barrels, thirty cents a barrel; and from five barrels to any number, twenty-five cents."

Section 12 reads as follows:

"Be it further enacted, That if any carrier, forwarding agent, or warehouseman shall refuse to pay the inspection fees as provided in this act, he shall be guilty of a misdemeanor, and on conviction before a competent tribunal of the refusal to pay the fees, he shall be fined $10 for each refusal, the fine to go to the school fund of the state."

The court will observe that the Tennessee act provided for substantially the same scale of fees, made no exception in favor of interstate commerce, just as does the Washington statute, and in addition to this, authorized inspection *in transitu*, which our act does not do. That case was an injunction action to restrain the enforcement of the act just as is the case at bar. The complaint alleged that the plaintiff, General Oil Company, was engaged in the manufacture and sale of illuminating oils in various states of the Union; and that it was its custom to ship this oil in tank cars from Pennsylvania and Ohio to Memphis, in the state of Tennessee, for the purpose of local sale and also for trans-shipment to other states.

We quote from the statement of facts as set forth in the decision (p. 213):

"At Memphis plaintiff has numerous tanks or receptacles for oil of various kinds and sizes, among which are the following: (1) A tank or vessel in which is kept oil for which orders have been received from the states above mentioned before its shipment from the manufacturing plants, and which is especially shipped to fill such orders. This oil is unloaded at Memphis only for the purpose of distribution in smaller vessels to meet the requirements of such orders, and is kept separate from oils for sale in Tennessee, in a tank plainly and conspicuously marked 'Oil Already Sold in Arkansas, Louisiana, and Mississippi,' and remains in Tennessee only long enough (a few days) to be properly distributed according to the orders therefor. (2) Another tank or vessel for oil to be sold in those states, but for which (there were) no orders at the time of shipment from the manufacturing plants. This tank is marked 'Oil to Be Sold in Arkansas, Louisiana, and Mississippi,' and is kept separate and apart from all other oil until required to supply orders from plaintiff's customers in those states, and is never sold except upon the receipt of such orders."

The complaint also alleged that the defendant claimed the right to inspect these oils and collect these fees, although he knew and admitted that no sales of such oils were made in Tennessee. It was further alleged that *"the fees are unreasonable and exorbitant for the service performed, and very much greater than necessary to provide for inspection, and that, after payment of the salaries and other expenses incident to inspection, there is a surplus of many thousands of dollars put into the treasury annually."* (Italics ours.)

The case was decided in the Tennessee court upon demurrer to the complaint and this allegation was therefore taken as true and the case decided upon the assumption that the act was in reality a revenue measure in the guise of an inspection act. The court sustained the decision of the Tennessee court in the following language (p. 228):

"The beginning and the ending of the transit which constitutes interstate commerce are easy to mark. The first is defined in *Coe v. Errol*, 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. Rep. 475, to be the point of time that an article is committed to a carrier for transportation to the state of its destination, or started on its ultimate passage. The latter is defined to be, in *Brown v. Houston*, 114 U. S. 622, 29 L. Ed. 257, 5 Sup. Ct. Rep. 1091, the point of time at which it arrives at its destination. But intermediate between these points questions may arise. *State, Detmold, Prosecutor, v. Engle*, 34 N. J. L. 425; *State, Lehigh & W. Coal Co., Prosecutors, v. Carrigan*, 39 N. J. L. 35; *The Daniel Ball* (*The Daniel Ball v. United States*), 10 Wall. 557, 19 L. Ed. 999.

"In *Pittsburg & S. Coal Co. v. Bates*, 156 U. S. 577, 39 L. Ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415, coal in barges shipped from Pittsburg, Pennsylvania, to Baton Rouge, Louisiana, was stopped about nine miles above destination. It was held that it had ceased to be interstate commerce, and was subject to taxation by the state of Louisiana."

After reviewing many decisions, the court further continued (p. 231):

"Like comment is applicable to plaintiff in error and its oil. The company was doing business in the state, and its property was receiving the protection of the state. Its oil was not in movement through the state. It had reached the destination of its first shipment, and it was held there, not in necessary delay or accommodation to the means of transportation,

as in *State v. Engle, supra,* but for the business purposes and profit of the company. It was only there for distribution, it is said, to fulfill orders already received. But to do this required that the property be given a locality in the state beyond a mere halting in its transportation. It required storage there—the maintenance of the means of storage; of putting it in and taking it from storage. The bill takes pains to allege this. 'Complainant shows that it is impossible, in the coal oil business, such as complainant carries on, to fill separately each of these small orders directly from the railroad tank cars, because of the great delay and expense in the way of freight charges incident to such a plan, and for the further reason that an extensive plant and apparatus is necessary in order to properly and conveniently unload and receive the oil from said tank cars, and it would be impracticable, if not impossible, to have such apparatus and machinery at every point to which complainant ships said oil.'

"This certainly describes a business,—describes a purpose for which the oil is taken from transportation, brought to rest in the state, and for which the protection of the state is necessary,—a purpose outside of the mere transportation of the oil. The case, therefore, comes under the principle announced in *American Steel & Wire Co. v. Speed,* 192 U. S. 500, 48 L. Ed. 538, 24 Sup. Ct. Rep. 365.

"*We have considered this case so far in view of the cases which involve the power of taxation. It may be that such power is more limited than the power to enact inspection laws. Patapsco Guano Co. v. Board of Agriculture,* 171 U. S. 356, 43 L. Ed. 195, 18 Sup. Ct. Rep. 862. The difference, if any exists, it is not necessary to observe. The cases based on the *taxing power* show the contentions of plaintiff in error are without merit; in other words, show that its oil was not property in interstate commerce." (Italics ours.)

Justices Moody and Holmes dissented from this decision in so far as it related to oil which had been

placed in separate tanks and was held in Tennessee temporarily for the purpose of trans-shipment to other states; but even in the course of his dissenting opinion, Justice Moody observed (p. 235):

"The case of *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 48 L. Ed. 538, 24 Sup. Ct. Rep. 365, holds that articles, before they have ceased to be the subjects of interstate commerce, may still be reached by the taxing power of the state."

In view of the allegation in the complaint that respondent's products are held for use and consumption in this state, it would seem that even under the dissenting opinion in the *Crain* case, respondent's contention cannot be sustained.

It would be unnecessary to add anything further were it not for certain erroneous conclusions which counsel appear to have drawn from the case of *Foote v. Stanley*, 232 U. S. 494, 58 L. Ed. 698, already referred to. As we have shown in another connection, that case involved the validity of an act providing for the inspection of oysters coming into the state of Maryland. In order to properly understand the scope of that decision, it is necessary to examine the Maryland act, as the opinion of the court does not disclose all of its material provisions. This act will be found beginning on page 205 of the Session Laws of Maryland for 1910, being chapter 413. Section 69 of this act provided for the appointment of district oyster inspectors, and then contained the following provision:

"* * * a charge of one cent per bushel is hereby levied to help defray the expenses of such inspection and the other expenses of the state fishery

force, *upon all oysters unloaded from vessels at the place where said oysters are to be no further shipped in bulk in vessels*, * * * ." (Italics ours.)

After prescribing various details, the section further provides:

"* * * and all transportation companies carrying oysters in the shell, consigned to Baltimore, shall furnish to the oyster inspector or collector of oyster tax a copy of his manifest, showing the number of bushels on board on arrival of steamer and to whom consigned, * * *."

This section, as appears from the opinion of the court, then provided for a form of certificate to be issued by the inspector, reading as follows:

"....., 19....

"I hereby certify that I have this day inspected for Captain....., schooner..... a cargo of oysters, sold to....., and found the same to contain.....bushels of merchantable oysters, and.....bushels of unmerchantable oysters.

"(Signed)....."

The court will observe that the Maryland tax was imposed upon all oysters unloaded from vessels at the place where they were to be no longer shipped by that method of transportation, irrespective of where they were consigned or even whether or not they were intended to be sold or used in the state of Maryland. While the opinion does not disclose when the inspection was sought to be made, the fact that counsel for the plaintiff in error urged that "the act of inspection of goods shipped into a state must be performed at the termination of the shipment, or, as Chief Justice

Marshall observed, it must be on land while the article is in the bosom of the country," makes it apparent that the inspection was made before the goods had reached their final destination. It seems apparent, therefore, that the Maryland statute was a clear interference with interstate commerce and could not be justified, as was the Tennessee act or as can be the Washington act. Indeed, this appears to have been so clear that Justice Lamar does not even discuss it, but assumes that the act did interfere with an article while in course of interstate commerce, and therefore very properly confines his discussion to the question of the reasonableness of the fees prescribed. This is very apparent from the fact that the court nowhere mentions or refers to the case of *General Oil Company v. Crain*, 209 U. S. 211, 52 L. Ed. 754. We have shown that the *Crain* case clearly holds that an ostensible inspection fee, which is in reality a revenue measure, does not interfere with interstate commerce if imposed upon an article after it has ceased to move in such commerce and after it comes within the protection of the state laws. The *Foote* case, without any discussion of the self-evident fact that the Maryland act did so operate, holds the inspection fee prescribed by that act to be void because it was in reality a revenue measure. If the distinction in the two acts which we have pointed out be adopted, they are in no way inconsistent. If it be rejected, the *Foote* case must be taken as overruling the *Crain* case without any reference whatever to the decision overruled, or even without any reference to the subject-matter of the decision.

This is clearly explained by the Supreme court of Minnesota in the case of *State v. Bartles Oil Company*, 132 Minn. 138, 155 N. W. 1035, where the court, in discussing the validity of an oil inspection act, alleged to be excessive, said (p. 1036):

"Very clearly it is the purpose of the statute to impose an inspection only upon oil products coming into the state and sold to the public. The inspection is imposed for the protection of those to whom the dealer makes sales. It is not for his protection in purchasing from the refineries. The facts in the case of *General Oil Co. v. Crain*, 209 U. S. 211, 28 Sup. Ct. 475, 52 L. Ed. 754, involving a state oil inspection, where it was held that oil at rest in the state, though intended for shipment out of it, was not the subject of interstate commerce, are very much stronger in support of a claim that the property was the subject of interstate commerce than are the facts in the case at bar. Upon this general question see *Susquehanna Coal Co. v. South Amboy*, 228 U. S. 665, 33 Sup. Ct. 712, 57 L. Ed. 1015; *Bacon v. Illinois*, 227 U. S. 504, 33 Sup. Ct. 299, 57 L. Ed. 615; *Chicago etc. Ry. Co. v. Iowa*, 233 U. S. 334, 34 Sup. Ct. 592, 58 L. Ed. 988. The defendant relies particularly upon *Foote v. Stanley*, 232 U. S. 494, 34 Sup. Ct. 377, 58 L. Ed. 698, and *Bartels Northern Oil Co. v. Jackman*, 29 N. D. 236, 150 N. W. 576, and *Castle v. Mason* (Ohio), 110 N. E. 463, which were decided in reliance upon it. The *Foote* case does not overrule the *Crain* case. On the contrary, the *Crain* case is followed in later cases and the doctrine of it is distinctly approved. We are of the opinion that the inspection for which recovery was had was not an inspection of property the subject of interstate commerce."

We anticipate that counsel will argue that this case was based upon the ground that the fees in question were reasonable. While this was one of the grounds of the decision, a separate and independent

ground was that irrespective of that, the act did not interfere with interstate commerce.

Plaintiff in error seeks to distinguish the *Crain* and the *Foote* cases on the ground that the principle decided in the *Crain* case was that property within a state for the convenience of its owner and receiving the protection of its laws is subject to state taxation. In other words, plaintiff in error seeks to draw a distinction between the right of a state to collect a general property tax upon goods coming from another state the transit of which is ended, and the right of a state to levy excise taxes on a certain commodity when such tax affects goods coming from another state, although the transit of such goods has also ended.

The court in the *Crain* case must have anticipated that at some time in the future such a contention would be made, for in that case the court said:

"We have considered this case so far in view of the cases which involve the power of taxation. It may be that such power is more limited than the power to enact inspection laws. *Patapsco Guano Co. v. Board of Agriculture,* 171 U. S. 345, 356. The difference, if any exist, it is not necessary to observe. The cases based on the taxing power show the contentions of plaintiff in error are without merit. In other words, show that its oil was not property in interstate commerce."

This statement of the court makes it entirely clear that the first inquiry in determining whether there is an interference by the state with interstate commerce is to ascertain whether the transit has ended. If it has, the goods cease to be in interstate

commerce, and whether the particular tax be an inspection law, a general property tax, or an excise tax is immaterial to this court.

Plaintiff in error apparently concedes that the *Crain* case is authority for the proposition that the state may collect general property taxes on goods which have come in from another state even prior to a first sale of such goods, but contends that any other form of tax on such goods is invalid. It is apparent that, under this contention, plaintiff in error would have the question of the ending of interstate commerce depend upon the constitutional right of the particular state into which the goods were shipped to collect particular forms of taxes. In other words, as general property taxes in the state of Washington must be levied on all property equally, a law which permits excessive inspection fees is invalid, while in some other state where the general property tax need not be levied upon all classes of property equally, the inspection law would be valid. We do not conceive that the power of congress over interstate commerce rests upon any such basis.

Counsel cites the decisions of several state courts as authority (brief, pp. 19 and 20).

As we have heretofore pointed out, the Minnesota case of *State v. Bartles Oil Co.*, 132 Minn. 138, 155 N. W. 1035, upholds the Minnesota act so far as the Federal constitution is concerned.

Counsel say that the Ohio court in *Castle v. Mason*, 91 Ohio St. 296, 110 N. E. 463, based its decis-

ion upon the commerce clause of the Federal constitution. While there is some loose language in the decision which might support this contention, the commerce clause is not specifically referred to. Upon the contrary, the decision is based squarely upon article I, section 10 of the Federal constitution, relating to imports and exports. We quote from page 465, where it is said:

"What we do hold is that, under the facts disclosed here, where it appears that the fees are not only excessive, but are being continued, yielding each and every year increasing net revenues, the natural operative effect of the inspection act thus shown is in direct violation of article I, section 10 of the United States constitution, and consequently void."

The North Dakota case of *Bartles Northern Oil Company v. Jackman*, 29 N. D. 236, 150 N. W. 576, is clearly distinguishable upon the facts, although the opinion proceeds upon an erroneous construction of the case of *Foote v. Stanley*, 232 U. S. 494, 58 L. Ed. 698. If the court will turn to page 578 of this decision, it will find that the North Dakota act did in fact impose a direct burden upon interstate commerce. This act provided, among other things, that when any person, firm or corporation should fail to pay any inspection fees it should be the duty "of the state inspector or his deputies on receipt of such notice to hold any and all future shipments of petroleum, illuminating oils, gasoline, or other petroleum products consigned by any such persons, firms, or corporations, until all delinquent fees have been paid." In other words, failure to pay an inspection fee was punishable by a deprivation of the right to engage in

interstate commerce—a direct interference with that commerce.

This act also provided that each transportation company "is required to stop and hold for inspection at points of entry all consignments of such goods." The bill of complaint in that case alleged that because the complainant had failed to pay certain fees the oil inspector had seized other interstate shipments while in course of transit, and upon that theory the action was instituted.

Read in the light of these facts this decision is in no way controlling here because the North Dakota statute directly prohibited interstate commerce where the consignees had failed at some prior time to pay these fees—a situation in no way involved in the present action.

The supreme court of Kansas in the case of *State ex rel. Brewster v. Cumiskey*, 97 Kan. 343, 155 Pac. 47, held the statute there under consideration invalid because it violated the state constitution. The Kansas court expressly refused to pass upon the Federal questions suggested as appears from page 51 of the decision, where the court said:

"The law is challenged as in contravention of certain provisions of the constitution of the United States. *It is not necessary to discuss the very interesting questions thus raised.*" (Italics ours.)

Clearly then the supreme court of Kansas has not held a statute of this character to be in contravention of the Federal constitution.

In *State v. Standard Oil Company*, 100 Nebr. 826, 161 N. W. 537, the decision, as shown by the syl-

labus written by the court, is based upon the provisions of the state constitution.

We assume that, unless the act in question violates the commerce clause, this court is not concerned with the question of whether the act provides for a general property tax, an excise tax or an occupation tax. Of course, this court is not bound by the holding of a state court that a certain tax does not interfere with interstate commerce because it is a property, excise or occupation tax, as the case may be; but once this court determines that the tax does not burden interstate commerce, neither the nature of the tax nor the question of its validity under the state constitution is a matter of concern.

The fallacy of plaintiff's whole argument becomes immediately apparent when we attempt to apply it to the taxing power of the state. Under plaintiff's contention the state of Washington would be deprived of the power to levy excise taxes on any article which the state does not produce. It could levy no such taxes on oranges since we raise no oranges, nor on whiskey, perfumes nor tobacco since this state is not essentially a manufacturing state and produces few luxuries. It could, however, levy an excise tax on auto trucks, since the state has one concern manufacturing trucks on a small scale. But pleasure cars could not be taxed, as there are no pleasure cars produced in the state. But we presume that under plaintiff's theory an act levying an excise on trucks would become invalid should the single truck factory burn or the concern cease business. We do not conceive

that the state's power to levy excise taxes is prescribed within such narrow bounds that the validity of the act depends on whether the particular article taxed is produced within the state at the particular time the validity of the act is questioned.

THE ACT DOES NOT VIOLATE THE FOURTEENTH AMENDMENT.

It is argued that the tax is invalid because it is arbitrarily imposed only upon original vendors of oil, and that in consequence the plaintiff is denied the equal protection of the laws.

In *McCray v. United States*, 195 U. S. 27, it was held that a tax of ten cents per pound upon oleomargarine, artificially colored, was an excise tax, the court saying (p. 50):

"That the acts in question on their face impose excise taxes which congress had the power to levy is so completely established as to require only statement."

The validity of the tax was sustained.

In *Patton v. Brady*, 184 U. S. 608, the court had under consideration the nature of the tax levied on tobacco by the war revenue act of June 13, 1898. That act provided for a tax of twelve cents per pound upon all tobacco and snuff, however prepared, manufactured, and sold, or removed for consumption or sale. Holding that the tax was an excise rather than a direct tax upon property, the court said (p. 617):

"Ever since the early part of the Civil war there has been a body of legislation, gathered in the statutes under the title *Internal Revenue*, by which, upon

goods intended for consumption, excises have been imposed in different forms at some time intermediate the beginning of manufacture or production and the act of consumption."

The Federal constitution contains no limitation upon the power of the states to impose excises, and the objects upon which these taxes may be imposed are matters for selection by the states. It would seem that the right of the state to impose an excise tax upon oil "at some time intermediate the beginning of manufacture or production and the act of consumption" is as clear as is the right of congress to impose a similar excise upon tobacco, liquor, drugs, oleomargarine, automobiles, or other luxuries or necessities.

Respectfully submitted,

W. V. TANNER,
Attorney General.

L. L. THOMPSON,
Assistant Attorney General.

GLENN J. FAIRBROOK,
Assistant Attorney General.

Attorneys for Defendants in Error.